CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **APRIL 12, 1995** **NO. 15**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decision

19 CFR Parts 10, 123, 145 and 178

(T.D. 94–47)

ELIMINATION OF CERTAIN DOCUMENTATION REQUIREMENTS FOR ARTICLES ENTERED UNDER VARIOUS SPECIAL TARIFF TREATMENT PROGRAMS AND PROVISIONS

RIN 1515–AB40

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document corrects a final rule document which amended the Customs Regulations by removing certain documentation requirements relating to the entry of articles claimed to be entitled to a partial duty exemption or duty-free treatment under various special tariff provisions or programs. The correction involves an amendatory instruction regarding § 178.2 of the Customs Regulations which lists the control numbers for approvals of information collection requirements.

EFFECTIVE DATE: This correction is effective June 16, 1994.

FOR FURTHER INFORMATION CONTACT: Craig Walker, Office of Regulations and Rulings, 202–482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 17, 1994, Customs published in the Federal Register (59 FR 25563) a final rule document amending the Customs Regulations to remove certain documentation requirements relating to the entry of articles claimed to be entitled to a partial duty exemption or duty-free treatment under various special tariff provisions or programs. Among the amendments were consequential amendments to § 178.2 of the Customs Regulations (19 CFR 178.2) concerning the revision, removal or addition of listings in the table setting forth the listing of Office of Management and Budget control numbers for approvals of information

collection requirements pursuant to the Paperwork Reduction Act of 1980. One of the removed listings referred to in the amendatory instruction was the listing for § 10.8(e). However, this reference was incorrect because, in an interim rule document published in the Federal Register on December 30, 1993 (58 FR 69460), § 178.2 had been amended by removing from the table the reference to "§ 10.8(e)" and adding, in its place, the reference "§ 10.8(f)". Accordingly, this document corrects the amendatory instruction for § 178.2 in the May 17, 1994, final rule document to properly refer to the removal of § 10.8(f).

CORRECTION OF PUBLICATION

In the document published in the Federal Register as T.D. 94–47 on May 17, 1994 (59 FR 25563), on page 25571, second and third columns, the amendatory instruction for § 178.2 is corrected to read as follows:

"2. Section 178.2 is amended by revising the listings for §§ 10.1 and 10.173, removing the listings for §§ 10.8(f), 10.9(e), and 10.191–10.198 and adding, in their place respectively, listings for §§ 10.8, 10.9, and 10.198 to read as follows:"

Dated: March 23, 1995.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, March 29, 1995 (60 FR 16046)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 28, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF SHOE SPIKES (STUDDED PULLOVERS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings pertaining to the tariff classification of studded pullovers, also known as shoe spikes.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 12, 1995.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Metals and Machinery Classification Branch, (202) 482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 15, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 7, proposing to revoke DD 898471 issued

on June 7, 1994, by the District Director of Customs, New Orleans, Louisiana, and Headquarters Ruling Letter (HRL) 087541 issued October 11, 1990, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of studded pullovers for shoes and boots. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter section 625), this notice advises interested parties that Customs is revoking DD 898471 and HRL 087541 to reflect the proper classification of studded pullovers for shoes and boots under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other. HRL 956963 revoking DD 898471 is set forth in Attachment A to this document. HRL 957548 revoking HRL 087541 is set forth in Attachment B to this document. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 21, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 21, 1995.

CLA–2 CO:R:C:M 956963 DFC
Category: Classification
Tariff No. 7326.90.85

PETER W. KLESTADT, ESQ.
ERIK D. SMITHWEISS, ESQ.
GRUNFELD, DESIDERIO, LEBOWITZ AND SILVERMAN
245 Park Avenue
New York, NY 10167–0002

Re: Footwear; parts of footwear; pullovers, studded; shoe spikes with straps; composite goods; essential character; *U.S. v. Willoughby Camera Stores; Gallagher & Ascher Company U.S.;* HRL's 084088, 087541, 955987; DD 898471 revoked.

DEAR MESSRS. KLESTADT AND SMITHWEISS:

In a letter dated August 25, 1994, on behalf of ContiTech Group, you asked that District Ruling (DD) 898471 issued to them on June 7, 1994, by the District Director of Customs, at New Orleans, Louisiana, be revoked. That ruling concerned the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of studded pullovers for shoes and boots. Samples were submitted for examination. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs

Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter section 625), notice of the proposed revocation of DD 898471 was published February 15, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 7.

Facts:

Samples of two types of studded pullovers, identified as "Spiky" and "Spiky Plus," were submitted for examination. They are designed to provide slip protection on ice and snow. Metal spikes are set in tough flanges, which are pressed into a contoured, sandal-like rubber harness that pulls on and off over any type of shoe or boot by means of a heel tab. The rubber harness merely holds the metal spikes in place. The harness does not cover the sole or upper or provide protection against water, oil, grease or chemicals or cold or inclement weather. "Spiky," has four metal spikes in the toe area positioned under the ball of the wearers foot. "Spiky Plus," has four metal spikes in the toe area as well as two in the heel area. You indicate that the weight of the rubber is on average 84.5% of the total weight of the article. Further, that the value of the rubber is on average 82.8% of the total value of the article.

In DD 898471, the District Director ruled that studded pullovers represented by the samples are classifiable under subheading 6406.99.90, HTSUS, which provides for parts of footwear, other, of other materials, other. The current applicable rate of duty for this provision is 14.4% *ad valorem*.

You claim that the studded pullovers are classifiable under one of the following subheadings:

> Subheading 6402.99.15, [now 6402.99.18] HTSUS, which provides for other footwear with outer soles and uppers of rubber or plastics, other footwear, other, having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics, (except footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather), other. The applicable rate of duty for this provision is 6% *ad valorem*.
>
> Subheading 6406.20.00, HTSUS, which provides for outer soles and heels, of rubber or plastics. The applicable rate of duty for this provision is 4.8% *ad valorem*.
>
> Subheading 4016.99.05, HTSUS, which provides for other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included. The applicable rate of duty for this provision is 3.4% *ad valorem*.
>
> Subheading 4015.90.00, HTSUS, which provides for articles of apparel and clothing accessories (including gloves), for all purposes, of vulcanized rubber other than hard rubber, other. The applicable rate of duty for this provision is 4.8% *ad valorem*.

Issue:

Are the studded pullovers considered parts of footwear for tariff purposes?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's] ."

The Harmonized Commodity Description and Coding System Explanatory Notes to the HTSUS (EN), although not dispositive, or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989)

The General EN's to Chapter 64, HTSUS, provide, in pertinent part, as follows:

> With certain *exceptions* [not here applicable] this Chapter covers, under headings 64.01 to 64.05, various types of footwear (including overshoes) irrespective of their shape and size, the particular use for which they are designed, their method of manufacture or the materials of which they are made.
>
> For the purposes of this Chapter, the term 'footwear' *does not*, however, *include* disposable foot or shoe coverings of flimsy material (paper, sheeting of plastics, etc.) without applied soles. These products are classified according to their constituent material.
>
> (A) Footwear may range from sandals with uppers consisting simply of adjustable laces or ribbons to thigh-boots (the uppers of which cover the leg and thigh,

and which may have straps, etc., for fastening the uppers to the waist for better support) . The Chapter includes:

* * * * * * *

(7) Footwear obtained in a single piece, particularly by moulding rubber or plastics by carving from a solid piece of wood.

* * * * * * *

(9) Overshoes worn over other footwear; in some cases, they are heel-less.

* * * * * * *

(C) * * * In the case of footwear made in a single piece (e.g., clogs) without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface.

(D) For the purposes of the classification of footwear in this Chapter, the constituent material of the uppers must also be taken into account. The upper is the part of the shoe or boot above the sole. However, in certain footwear with plastic moulded soles or in shoes of the American Indian moccasin type, a single piece of material is used to form the sole and either the whole or part of the upper, thus making it difficult to identify the demarcation between the outer sole and the upper. In such cases, the upper shall be considered to be that portion of the shoe which covers the sides and top of the foot. The size of the uppers varies very much between different types of footwear, from those covering the foot and the whole leg, including the thigh (for example, fishermen's boots), to those which consist simply of straps or thongs (for example, sandals).

You state that the above cited EN's support your claim that the studded pullovers are footwear for the purposes of classification under headings 6401 through 6405, HTSUS, for the following reasons:

1. The cited EN's indicate that headings 6401 through 6405, HTSUS, cover articles made of a single piece of rubber which are worn over other shoes. Both "Spiky" pullovers satisfy this description and thus fall within the meaning of "footwear."

2. Classification under headings 6401 through 6405, HTSUS, does not require that the footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS. The EN's, provide in relevant part,that "in the case of footwear made in a single piece (e.g., clogs without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface. For purposes of classification, the "outer sole" of the "Spiky" is its lower surface.

3. With respect to the upper, the EN's make no distinction between elastic straps on footwear made in a single piece, and straps that are attached to a separate bottom or sole component. The "spiky" pullovers contain rubber straps which cover the side and top of the foot near the toe, and cover the side and upper ankle at the heel. These straps satisfy the description of an "upper."

4. In T.D. 93–88, published in the CUSTOMS BULLETIN on November 17, 1993, Customs defined the term "outer sole" as "that part of the footwear (other than a separate heel) in contact with the ground when in use. If it has no separate 'outer sole,' e.g., it has a one-piece clog bottom, the material of the 'outer sole' is the material of the shoes' lower surface." The term "upper" is defined in T.D. 93–88 as "the part of the shoe above the separate sole or that portion of the shoe which covers the sides and top of the foot if there is no separate sole. An 'upper' can cover the whole leg, thigh, hips, and chest (e.g., fishermen's chest waders) or can consist simply of straps, laces or thongs (e.g., Roman sandals)." Thus, based on the foregoing definitions, the studded pullovers are "footwear" for tariff purposes.

5. Customs has previously classified similar merchandise as complete footwear in headings 6401 through 6405, HTSUS. For example, in HRL 084088 dated June 13, 1989, Customs classified a "super sole foot gripper" under subheading 6404.19.35, HTSUS. This item was described as follows:

> This is a footwear item that is worn strapped to the bottom of a boot or shoe in order to provide better traction on soft surfaces. The foot gripper has an upper that consists of two one-inch wide textile straps with Velcro-type closures. It has a rubber outsole with ¼ inch high, molded-in cylinder shaped nubs that have protruding metal screw heads/studs which have been screwed in. A rubber insole with a non-skid, textured face has been stitched onto the rubber outsole.

Customs concluded that the "super sole footgripper" cannot be classified as a part of footwear because it is a complete shoe. In addition, it was noted that the foot grippers are worn

over other footwear and following General EN A(9) to Chapter 64, HTSUS, *supra*, are overshoes and, therefore must be classified as footwear.

CUSTOMS POSITION

We agree that classification under headings 6401 through 6405, HTSUS, does not require that the footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS.

The studded pullovers in issue are clearly "less than" footwear because most of the sole and almost all of the shoe or boot will still be seen and in use when this item is worn and even the little foot covering that it supplies is simply the result of the maker's not being able to find a way to keep the removable spikes securely attached and maintained in position while using thinner straps. The straps' only reason for being is obviously to assist the spikes. It appears to be your position that everything worn over a shoe or boot is an "overshoe." We disagree with this position. Items like removable riding spurs, whose thin straps, securing the spur, do cover some of the wearer's shoe, but are clearly not "overshoes."

You maintain that HRL 084088 dated June 13, 1989, holding that similar merchandise *viz.*, a "super sole foot gripper" is classifiable as footwear under subheading 6404.19.35, HTSUS, controls the classification of the "Spiky" pullovers. We disagree. The "super sole foot gripper" is considered to be complete footwear under that ruling, because it had an outsole and an upper whereas the instant studded pullovers are "less than footwear," *e.g.*, shoe spikes with straps. There is neither an outsole nor an upper.

STUDDED PULLOVERS ARE NOT PARTS OF FOOTWEAR

Heading 6406, HTSUS, provides, as follows:

> Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.

Additional U.S. Rule of Interpretation 1(c), HTSUS, provides as follows:

> 1. In the absence of special language or context which otherwise requires—
>
> (c) a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory [.]"

In the case of *United States v. Willoughby Camera Stores*, Inc., CCPA 322, 324, T.D. 46851 (1933), the court stated that "[i]t is a well-established rule that a 'part' of an article is something necessary to the completion of that article. It is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such.

This so-called "rule of essentiality" is not controlling in all cases. It has been held that a device may be a part of an article even though its use is optional and the article will function without it, where the device is dedicated for use upon the article, and, once installed, the article will not operate without it. See *e.g., Gallagher & Ascher Company v. United States*, 52 CCPA 11, C.A.D. 849 (1964).

The "Spiky" pullovers are complete and independent articles of commerce. Although worn over shoes, they are not integral, constituent, or component parts, without which the underlying shoes could not function as footwear. The "Spiky" pullovers are optional articles for use with footwear. Therefore, they are not parts of footwear for tariff purposes.

In Headquarters Ruling Letter (HRL) 955987, dated June 30, 1994, Customs stated that "[t]he term 'accessory' is not defined either in the text of the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes. However, an accessory, while identifiable as being intended solely or principally for use with a specific article, is generally not necessary to enable a good with which it is used to fulfill its intended function. Accessories are of secondary importance, not essential in and of themselves. However, they must somehow contribute to the effectiveness of the principal article, they must facilitate its use or handling, widen its range of uses, or improve its operation."

In view of the foregoing, it is our position that the subject studded pullovers are "accessories" because:

1. they are intended to be used solely with footwear;
2. they are not necessary to enable the footwear with which they are used to fulfill its intended function; and
3. they are not essential in and of themselves, but do contribute to the effectiveness of the footwear in that they improve its performance [traction] on ice.

STUDDED PULLOVERS ARE NOT CLASSIFIABLE AS OUTER SOLES OF RUBBER OR PLASTICS

We agree that "Spiky" pullovers are not provided for in heading 6406, HTSUS, as either removable insoles, heel cushions and similar articles or as gaiters, leggings and similar articles, and parts thereof.

However, you claim that studded pullovers, if not footwear, are properly classifiable under subheading 6406.20.00, HTSUS, which provides for outer soles and heels, of rubber or plastics. The basis for this claim is found in HRL 087541, dated October 11, 1991, wherein Customs held that certain shoe spikes were classifiable as parts of footwear under subheading 6406.99.90, HTSUS. In reaching this conclusion Customs erroneously stated that "[t]he shoe spikes are outer soles that are similar to footwear parts that are listed in this provision. The article which was the subject of HRL 087541 looked, due to its design, more like a half sole [plus the very unusual spikes and straps] than the one in issue. However, there is no question that neither are known to the trade and public as "outer soles." The fact that other items in heading 6406, HTSUS, which are not parts, are removable is irrelevant, despite HRL 087541, to the fact that permanent attachment is a very strong element in both the trade and common meaning of "outer soles." When the fact that it is also much "more than" the ordinary "outer sole," in having spikes and about as much strapping over and around the foot as under it, and that it is much "less than" one, in that large parts of the outer sole of the shoe it is used with will be in contact with the ground in use, "outer sole" is clearly an inappropriate name.

STUDDED PULLOVERS ARE CLASSIFIABLE UNDER HEADING 7326, HTSUS

Inasmuch as the studded pullovers are composite goods, their classification is governed by GRI 3(b), HTSUS, which reads, as follows:

> 3. When, by application of rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The studded pullovers are *prima facie* classifiable under subheading 4016.99.05, HTSUS, as other articles of vulcanized rubber other than hard rubber, other, household articles not elsewhere specified or included; or under subheading 4015.90.00, HTSUS, as articles of apparel and clothing accessories, of vulcanized rubber other than hard rubber, other; or under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Composite goods are classifiable as if they consisted of the material or component which gives them their essential character. EN VIII to GRI 3(b), at page 4, reads as follows:

> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The rubber portion of the pullovers exceeds the metal spikes in terms of bulk, weight and probably value. However, the metal spikes perform a crucial function in providing traction for shoes on ice and snow. Thus, we are unable to determine whether the metal spikes or the rubber portion of the pullovers imparts the essential character thereto. Consequently, following GRI 3(c), classification under subheading 7326.90.85, HTSUS, is appropriate as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Holding:

The "Spiky" pullovers are dutiable at the rate of 5.1% *ad valorem* under subheading 7326.90.85, HTSUS.

DD 898471 is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 21, 1995.

CLA–2: CO:R:C:M 957548
Category: Classification
Tariff No. 7326.90.85

MS. LEAH M. POUDRIER
WEISSENFELS, INC.
44 Amaral Street
East Providence, RI 02915

Re: Footwear; parts of footwear; shoe spikes; essential character; composite goods; HRL 955987; *U.S. v. Willoughby Camera Stores; Gallagher & Ascher v. U.S.;* HRL 87541 revoked.

DEAR MS. POUDRIER:

This is in reference to Headquarters Ruling Letter (HRL) 087541 issued to you on October 11, 1990, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of certain shoe spikes produced in Italy. We have reviewed that ruling issued in response to your letter of June 5, 1990, and find that it is in error. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter section 625), notice of the proposed revocation of DD 898471 was published February 15, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 7.

Facts:

The merchandise involved is a pair of removable shoe spikes that are designed to provide traction to shoes on ice or snow. The metal studs are 3/16 inch thick and are riveted to a fluted rubber pad that serves as a partial outer sole. The rubber pad is somewhat triangular in shape with a base that is 3 inches wide and 2½ inches long. The small end of the pad, which faces the wearer's shoe, splits into two rubber strips that wrap around the back of the shoe to hold the shoe spikes in place. The strips are approximately ½ inch wide and 8 inches long. They interlock by means of a rubber rivet which allows the spikes to be adjusted in length to wrap around the wearer's shoe. The top of the pad has a 2¼ inch wide slot which is designed to be stretched over the toe of the wearer's shoe. The spikes are designed to be positioned under the ball of the wearer's foot.

In Headquarters Ruling Letter (HRL) 087541 Customs held that the subject merchandise is classifiable under subheading 6406.99.90, HTSUS, which provides for parts of footwear, other, of other materials, other.

Issue:

Are the shoe spikes considered parts of footwear for tariff purposes?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section of chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]."

In HRL 087541, we stated that the shoe spikes do not have an upper with an applied sole. Therefore, they cannot be classified as footwear. This is inaccurate because classification under headings 6401 through 6405, HTSUS, does not require that footwear have an applied sole with the exception of certain textile footwear. See Note 1(a) to Chapter 64, HTSUS.

SHOE SPIKES ARE NOT PARTS OF FOOTWEAR

Heading 6406, HTSUS, provides as follows:

> Parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof.

Additional U.S. Rule of Interpretation 1(c), HTSUS, provides as follows:

> 1. In the absence of special language or context which otherwise requires—
>
> (c) a provision for parts of an article covers products solely or principally used as a part of such articles but does not prevail over a specific provision for such part or accessory[.]"

In the case of *United States v. Willoughby Camera Stores, Inc.*, CCPA 322, 324, T.D. 46851 (1933), the court stated that "[i]t is a well-established rule that a 'part' of an article is something necessary to the completion of that article. It is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article."

This so-called "rule of essentiality" is not controlling in all cases. It has been held that a device may be a part of an article even though its use is optional and the article will function without it, where the device is dedicated for use upon the article, and, once installed, the article will not operate without it. See *e.g., Gallagher & Ascher Company v. United States*, 52 CCPA 11, C.A.D. 849 (1964).

The shoe spikes are complete and independent articles of commerce. Although worn over shoes, they are not integral, constituent, or component parts, without which the underlying shoes could not function as footwear. The shoe spikes are optional articles for use with footwear. Therefore, they are not parts of footwear for tariff purposes.

In HRL 955987 dated June 30, 1994, Customs stated that "[t]he term 'accessory' is not defined either in the text of the HTSUS or in the Harmonized Commodity Description and Coding System Explanatory Notes. However, an accessory, while identifiable as being intended solely or principally for use with a specific article, is generally not necessary to enable a good with which it is used to fulfill its intended function. Accessories are of secondary importance, not essential in and of themselves. However, they must somehow contribute to the effectiveness of the principal article, they must facilitate its use or handling, widen its range of uses, or improve its operation."

In view of the foregoing, it is our position that the subject shoe spikes are "accessories" because:

> 1. they are intended to be used solely with footwear;
> 2. they are not necessary to enable the footwear with which they are used to fulfill its intended function; and
> 3. they are not essential in and of themselves, but do contribute to the effectiveness of the footwear in that they improve its performance [traction] on ice.

SHOE SPIKES ARE CLASSIFIABLE UNDER HEADING 7326, HTSUS.

Inasmuch as shoe spikes made of metal and rubber are composite goods, their classification is governed by GRI 3(b), HTSUS, which reads, as follows:

> 3. When, by application of rule 2(b) or for any other reason, goods are *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The shoe spikes are *prima facie* classifiable under subheading 4016.99.05, HTSUS, as other articles of vulcanized rubber other than hard rubber other, household articles not elsewhere specified or included; or under subheading 4015.90.00, HTSUS, as articles apparel and clothing accessories of vulcanized rubber other than hard rubber; other, or under subheading 7326.90.85, HTSUS, as other articles of iron or steel, other, other, other.

Composite goods are classifiable as if they consisted of the material or component which gives them their essential character. EN VIII to GRI 3(b), as page 4, reads as follows:

> (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

The rubber portion of the shoe spikes exceeds the metal spikes in terms of bulk, weight, and probably value. However, the metal spikes perform a crucial function in providing traction for shoes on ice and snow. Thus, we are unable to determine whether the metal spikes or the rubber portion of the shoe spikes imparts the essential character thereto. Consequently, following GRI 3(c), HTSUS, classification under subheading 7326.90.85, HTSUS,

is appropriate as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Holding:

The shoe spikes are dutiable at the rate of 5.1% *ad valorem* under subheading 7326.90.85, HTSUS.

HRL 087541 is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF A GLASS FLOWER POT

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a glass flower pot. Comments are invited on the correctness of the prosed ruling.

DATE: Comments must be received on or before May 12, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a glass flower pot. Comments are invited on the correctness of the proposed ruling.

In New York Ruling Letter (NYRL) 896081, issued on April 11, 1994, a 2½″ high and 2½″ diameter empty frosted glass vessel was determined to be a glass flower pot and classified under subheading 7013.99.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): other glassware: other: valued at $0.30 but not over $3 each. NYRL 896081 is set forth as "Attachment A" to this document.

Customs is of the opinion that subheading 9405.50.40, HTSUS, which provides for lamps, lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included: illuminated signs, illuminated nameplates and the like, having a permanently fixed light source and parts thereof not elsewhere specified or included: non-electrical lamps and lighting fittings: other: other, describes the article. The subject articles are not principally used as the class or kind of merchandise, namely flower pots for indoor decoration, contemplated by subheading 7013.99.50, HTSUS.

Flower pots necessarily have drainage holes either in their bottoms or on their sides. These articles do not. Additionally, their small size and frosted nature is consistent with a candle holder's purpose. Frosted glass will defuse the light from a flame, creating light which appears to have a "softer glow". Furthermore, the samples appear to be made of thin glass, which indicates use as a flower pot may not have been contemplated. Finally, they do not meet the tariff definition of "votive" candles. Therefore, the article is classifiable under subheading 9405.50.40, HTSUS, because it is principally used as a candle holder.

Customs intends to revoke NYRL 896081 to reflect the proper classification of the glass candle holder. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 957127 revoking NYRL 896081 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 21, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 11, 1994.

CLA–2–70:S:N:N3:226 896081
Category: Classification
Tariff No. 7013.99.5000

MR. JOHN MOLSBERRY
ROBERT E. LANDWEER & CO., INC.
911 Western Avenue, Suite 208
Seattle, WA 98104

Re: The tariff classification of a flower pot from India.

DEAR MR. JOHN MOLSBERRY:

In your letter dated March 17, 1994, on behalf of Design Imports India, you requested a tariff classification ruling.

You claim the article is a votive candle holder and is classified under subheading 7013.99.3500, Harmonized Tariff Schedule of the united States (HTS). However, votive candle holders are items which are used to hold candles for religious or memorial purposes. This article (a flower pot) has the form of general purpose decorative glassware. Therefore, subheading 7013.99.3500 is not applicable. The flower pot measures three and one half inches high, the opening is three and three quarter inches wide and the base is two and one half inches wide.

The applicable subheading for the flower pot will be 7013.99.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for Glassware of a kind used for * * * indoor decoration or similar purposes * * * Other * * * Valued over $0.30 but not over $3 each. The duty rate will be 30 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 957127 MMC
Category: Classification
Tariff No. 9405.50.40

MR. JOHN M. MOLSBERRY
ROBERT E. LANDWEER & CO., INC.
CUSTOMHOUSE BROKERS
911 Western Avenue, Suite 208
Seattle, WA 98104

Re: NYRL 896081 revoked; glass candle holders, flower pots; principal use; additional U.S. Rule of Interpretation 1(a); votive; HRLs 956108, 088123, 953016, 088742, 950245, 950426, 089054; non-electrical lamps and lighting fittings; EN 94.05; candlesticks.

DEAR MR. MOLSBERRY:

This is in reference to your letters of July 5, and August 25, 1994, to Customs in New York, on behalf of Design Imports India, requesting reconsideration of New York Ruling

Letter (NYRL) 896081 dated April 11, 1994, in which you were advised of the classification of a "flower pot" shaped frosted glass article under the Harmonized Tariff Schedule of the United States (HTSUS). Samples were provided.

In NYRL 896081 you were advised that the subject articles were classified under subheading 7013.99.50. HTSUS. which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * other glassware * * * other * * * other * * * valued over $0.30 but not over $3 each. You believe that they could be considered votive candles, classifiable under subheading 7013.99.35. HTSUS, or, in the alternative, under subheading 9405.50.40. HTSUS. as non-electric lamps and lighting fittings.

Facts:

The articles in question are described as "flower pot vase" candle holders. The samples are made of thin frosted glass and measure approximately 3½" and 2½" high and 2½" in diameter. They are imported packed 6 to a master carton. Colors are unique to each carton.

Issue:

Are the "flower pot vase" articles classifiable as candle holders under subheading 9405.50.40. HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

GRI 6 provides that for legal purposes. the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules. on the understanding that only subheadings at the same level are comparable. For the purposes of this rule. the relative section. chapter and subchapter notes also apply. unless the context otherwise requires. The competing subheadings under consideration are as follows:

7013.99.35	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other glassware * * * Other * * * Other * * * Votive candle holders.
7013.99.50	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * other glassware * * * Other * * * Other * * * Valued over $0.30 but not over $3 each.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated Signs. illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Both subheading 7013.99.35 and 7013.99.50. HTSUS. are use provisions. There are two principal types of classification by use:

(1) according to the actual use of the imported article; and
(2) according to the use of the class or kind of goods to which the imported article belongs.

Use according to the class or kind of goods to which the imported article belongs is more prevalent in the tariff schedule. A few tariff provisions expressly state that classification is based on the use of the class or kind of goods to which the imported article belongs. However, in most instances, this type of classification is inferred from the language used in a particular provision. Because both subheadings contain the language "of the kind" and "used for", classification of goods under them are determined by the use of the class or kind of article to which the imported merchandise belongs.

If an article is classifiable according to the use of the class or kind of goods to which it belongs. Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that: [i]n the absence of special language or context which otherwise requires— (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the U.S. Court of International Trade (CIT) has provided factors, which are indicative but not conclusive, to apply when determining whether particular merchandise falls within a class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See: *Kraft, Inc. v. United States*, USITR, 16 CIT 483, (June 24, 1992) (hereinafter *Kraft); G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98. C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

Because both subheadings 7013.99.35 and 7013.99.50, HTSUS, are use provisions. Additional U.S. Rule of Interpretation 1(a), HTSUS, applies. This necessitates the application of the *Kraft* characteristics to the subject glassware. Application of the characteristics will determine to which class or kind the article belongs; indoor decoration or candle holders. Customs is of the opinion that the physical characteristics of the subject article, as well as the manner in which it is used, prevents it from being described by either subheading 7013.99.35 or 7013.99.50, HTSUS.

We are of the opinion that the subject articles are not principally used as the class or kind of merchandise, namely flower pots for indoor decoration, contemplated by subheading 7013.99.50, HTSUS. Flower pots necessarily have drainage holes either in their bottoms or on their sides. These articles do not. Additionally, their small size and frosted nature is consistent with a candle holder's purpose. Frosted glass will defuse the light from a flame, creating light which appears to have a "softer glow". Furthermore, the samples appear to be made of thin glass, which indicates use as a flower pot may not have been contemplated.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that the tariff definition of a glass votive-candle holder is a glass candle holder chiefly used in churches, where the candles are burned for devotional purposes. *See,* Headquarters Ruling Letter (HRL) 088123 dated February 25, 1991, HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanctuary lamps" which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. *See,* HRL 950426 dated June 19, 1992. No evidence has been provided to indicate that the subject article is principally used in a church or for devotional purposes. Additionally, the subject receptacle is not a sanctuary lamp or a candle holder described in HRL 950426. Moreover, the subject article does not have any physical characteristics (e.g.; screened religious scenes) consistent with a votive-candle holder. Therefore, classification under subheading 7013.99.35, HTSUS, is precluded.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989), EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(1)(6) states that this heading covers "* * * in particular candelabra, candlesticks, and candle brackets."

We are of the opinion that the terms "candlestick", "candlestick holder", and "candle holder" are interchangeable. Candle holder has been defined as a candlestick. *Webster's II New Riverside University Dictionary,* pg. 224 (1st ed. 1984), and as a holder for a candle; candlestick. *The Random House Dictionary of the English Language,* pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center. *Webster's New International Dictionary,* pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. United States,* 703 F. Supp. 941 (CIT 1988), *aff'd,* 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. United States,* 69 CCPA 128, 673 F.2d 1268 (1982).

We have previously held that empty glass candle holders are classified under subheading 9405.50.40. HTSUS, as non-electrical lamps and light fittings. *See,* HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 89054 dated August 2, 1991,

which classified glass candle holders as non-electrical lamps and light fittings under subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the subject articles are, in fact, candlesticks as the term is used in the ENs. They are principally used in the United States as support for a candle. They are not elaborate, but are of a simple form. Therefore, the articles are properly classified under subheading 9405.50.40. HTSUS, as non-electrical lamps and light fittings. For the reasons set forth in this ruling, NYRL 896081 is revoked.

Holding:

The candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, which is currently subject to the Column 1 duty rate of 7.6 percent *ad valorem*.

NYRL 896081 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION/REVOCATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF RUBBER/PLASTIC BOOT BOTTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification/revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another pertaining to the tariff classification of rubber/plastic boot bottoms. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before May 12, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Donald P. Cahill, Metals and Machinery Classification Branch, (202–482–7030).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling and revoke another pertaining to the tariff classification of rubber/plastic boot bottoms under the Harmonized Tariff Schedule of the United States (HTSUS).

In Headquarters Ruling Letter (HRL) 084361 dated June 21, 1989, a rubber/plastic boot bottom not covering the ankle and not having fasteners or laces was classified under subheading 6401.99.30, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed for use without closures. HRL 084361 is set forth in Attachment A to this document.

In DD 802426, issued on October 12, 1994, the Area Director of Customs, J.F.K. Airport, also ruled that a polyurethane boot bottom not covering the ankle and not having fasteners or laces was classified under subheading 6401.99.30, HTSUS. DD 802426 is set forth in Attachment B to this document.

Classification of the boot bottoms is based upon their condition as imported. *United States v. Citroen,* 223 U.S. 407 (1911) . As the boot bottoms are constructed of rubber/plastics, are waterproof and as imported do not cover the ankle, they are classifiable under subheading 6401.99, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other.

However, classification to the eight digit level is dependent upon whether or not the boot bottoms are designed for use without closures under subheading 6401.99.30, HTSUS, or with closures under subheading 6401.99.60, HTSUS. Inasmuch as we are unable to determine whether the boot bottoms which were the subject of HRL 084361 and DD 802425 are designed for use without closures or with closures, GRI 3(c), HTSUS, mandates classification of the boot bottoms under subheading 6401.99.60, HTSUS, as "* * * the heading which occurs last in numerical order among those which equally merit consideration." Customs intends to modify HRL 084361 and revoke DD 802426 to reflect the proper classification of rubber/plastic boot bottoms under subheading 6401.99.60, HTSUS, as waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather, other.

Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 957726 which modifies HRL 084361 is set forth in Attachment C to this document.

Proposed HRL 957682 which revokes DD 802425 is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 21, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 21, 1989.

CLA–2 CO:R:C:G 084361 DFC
Category: Classification
Tariff No. 6401.92.9000 and 6401.99.3000

MR. CHARLES DI PRINZIO
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 1219–9703

Re: Tariff classification of rubber boot bottoms manufactured in Canada.

DEAR MR. DI PRINZIO:

Your letter dated March 29, 1989, addressed to our Champlain office concerning the tariff classification of rubber boot bottoms, has been referred to this office for a direct reply to you. Samples were submitted for examination.

Facts:

The merchandise to be imported consists of three different rubber/plastic molded boot bottoms. These bottoms will be assembled in the United States to four (and presumably more) different types of uppers.

The bottoms labelled 7700 and 7800 are over-the ankle and have lower portions which vaguely resemble the lower portions of the original moon boot bottoms. Bottom 7700 is about 3¾ inches high. Bottom 7800 is about 7¼ inches high.

Bottom 6700/6300 is not of the over-the-ankle type. It resembles the "Rubber Ducky" bottom. Bottom 6700 will have a PU upper stitched to it in the United States which makes it about 6½ inches high. Bottom 6300 will have a leather and textile upper which will overlay the bottom but not increase its height.

You maintain that these bottoms are parts of footwear for tariff purposes.

Issue:

Whether the bottoms in their condition as imported exhibit the essential character of footwear.

Law and Analysis:

In applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the Customs Service must follow the terms of the statute. Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative

section or chapter notes, and provided such headings or notes do not otherwise require, according to (the remaining GRI's taken in order]." In other words classification is governed first by the terms of the headings of the tariff and relative section or chapter notes.

General Interpretative Rule 10(h), Tariff Schedules of the United States, provides as follows:

> unless the context requires otherwise, a tariff description for an article covers such article whether assembled or unassembled, and whether finished or unfinished.

GRI 2(a), HTSUSA, provides as follows:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule) entered unassembled or disassembled.

Both Rule 10(h) and GRI 2(a) are prospective in nature. That is in order to classify an unfinished article one must know what the article will be in its contemplated finished condition. In this situation a prospective application of GRI 2(a) to the instant bottoms is modified by the language of Chapter 64, HTSUSA, and the Explanatory Notes thereto.

For example, heading 6405, HTSUSA, provides for other footwear. The Explanatory Note for this heading reads in pertinent part as follows:

> Subject to Notes 1 and 4 to this Chapter, this heading covers all footwear having outer soles and uppers of a material or combination of materials not referred to in the preceding heading of this Chapter.
>
> * * * * * * *
>
> This heading excludes assemblies of parts (e.g., uppers whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in heading 64.01 to 64.05 (heading 64.06).

Also, heading 6406, HTSUSA, provides for parts of footwear; etc. Explanatory Note (A)(7) to this heading reads as follows:

This heading covers:

> (A) The various component parts of footwear; these parts may be of any material except asbestos.
>
> (7) Assemblies of parts (e.g., uppers whether or not affixed to an inner sole) not yet constituting nor having the essential character of footwear as described in headings 64.01 to 64.05.

Prior to the advent of the HTSUSA, it was our position that uppers with closed bottoms and having no outer soles were unfinished footwear for tariff purposes. See *Uniroyal v. United States*, 3 CIT 220 (1982). Under the HTSUSA the same articles are considered to be parts of footwear because they do not have the essential character of footwear i.e., having both soles and uppers provided for in headings 6401 through 6405, HTSUSA. We interpret this treatment of uppers affixed to inner soles as, effectively eliminating for the purposes of Chapter 64 consideration of articles such as the bottoms in issue in their contemplated finished condition. In other words, condition as: imported will govern classification of the instant merchandise.

In view of the foregoing, we cannot take into account any additions to complete the bottoms. In this instance we have bottoms with substantial upper portions. These bottoms in their condition as imported have the essential character of footwear. Specifically, they look and function much like rubber galoshes and, although not complete, provide a total covering for the foot.

It is to be noted that the bottoms labelled 6700 and 6300 are the same and as imported do not have a closure. Accordingly, these bottoms are classifiable under subheading 6401.99.3000, HTSUSA, as waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole not assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed for use without closures.

The bottoms labelled 7700 and 7800 are classifiable under subheading 6401.92.9000, HTSUSA, as waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, covering the ankle but not covering the knee, other.

Holding:

The bottoms labelled 7700 and 7800 are classifiable under subheading 6401.92.9000, HTSUSA, with duty at the general rate of 37.5 percent *ad valorem*.

Bottom 6700/6300 is classifiable under subheading 6401.99.3000, HTSUSA, with duty at the general rate of 25 percent *ad valorem*.

Merchandise which qualifies as "goods originating in the territory of Canada" as that term is defined in General Note 3(c)(vii)(B), HTSUSA, is eligible for reduced rates of duty upon importation into the United States. Consequently, bottom 6700/6300 may be eligible for a 22.5 percent *ad valorem* rate of duty while bottoms 7700 and 7800 may be eligible for a 33.7 percent *ad valorem* rate of duty.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Jamaica, NY, October 12, 1994.

CLA–2–04:K:C:A3:D23:DD 802426
Category: Classification
Tariff No. 6401.99.30

MS. TRACY ANN EHME
THE A.W. FENTON COMPANY INC.
P.O. Box 360614
Columbus, OH 43236–0614

Re: The tariff classification of a waterproof polyurethane boot bottom from Canada.

DEAR MS. EHME:

In your letter dated September 9, 1994, you requested a tariff classification on behalf of your client, Rocky Shoes & Boots Co., 45 East Canal Street, Nelsonville, OH 45764.

You included a sample, no style number designated, and described it as a waterproof polyurethane boot bean bottom, not covering the ankle, and without fasteners or laces. The boot bottom will be imported from Canada.

The applicable subheading will be 6401.99.30, Harmonized Tariff Schedule of the United States, which provides for footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes; other footwear; other; designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather; designed for use without closures. The duty rate will be 25% *ad valorem*.

We note that the sample shoe is not marked with the country of origin. Therefore, if imported as is, the shoe will not meet the country of origin marking requirements of 19 U.S.C. 1304. Accordingly, the shoes would not be considered legally marked under the provisions of 19 C.F.R. 134.11 which states, "Every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit."

This ruling is being issued under the provisions of Section 177 of the Customs Regulations.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

THOMAS MATTINA,
Area Director,
JFK Airport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M DEC
Category: Classification
Tariff No. 6401.99.60

MR. CHARLES DI PRINZIO
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 1219–9703

Re: Footwear; boot bottoms, rubber/plastics; GRI 3(c); *United States v. Citroen;* HRL 084361 modified.

DEAR MR. DI PRINZIO:

This is in reference to Headquarters Ruling Letter (HRL) 084361 issued to you on June 21, 1989, concerning, in part, the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of a rubber/plastic boot bottom labelled 6700/6300. We have reviewed that ruling and determined that it is in error.

Facts:

Bottom 6700/6300 is not of the over-the-ankle type. It resembles the "Rubber Ducky" bottom. Bottom 6700 will have a polyurethane upper stitched to it after importation into the United States which will make it about 6½ inches high. Bottom 6300 will have a leather and textile upper which will overlay the bottom but not increase its height. It is to be noted that both bottoms are the same and as imported do not have a closure.

In HRL 084361 Customs ruled that boot bottom 6700/6300 is classifiable under subheading 6401.99.30, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed for use without closures. The applicable rate of duty for this provision is 25% *ad valorem*.

Issue:

Is the boot bottom in its condition as imported designed for use without closures and classifiable under subheading 6401.99.30, HTSUS, or is it designed for use with closures and classifiable under subheading 6401.99.60, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

Classification of boot bottoms is based upon their condition as imported. *United States v. Citroen,* 223 U.S. 407 (1911). As the subject boot bottom is constructed of rubber/plastics, is waterproof and as imported does not cover the ankle, it is classifiable under subheading 6401.99, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other.

However, classification to the eight digit level is dependent upon whether or not the boot bottom is designed for use without closures under subheading 6401.99.30, HTSUS, or with closures under subheading 6401.99.60, HTSUS. Inasmuch as we are unable to determine whether boot bottom 6700/6300 is designed for use without closures or with closures, GRI 3(c), HTSUS, mandates classification of the boot bottom under subheading 6401.99.60, HTSUS, as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Holding:

Bottom 6700/6300 is classifiable under subheading 6401.99.60, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of

which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather, other. The applicable rate of duty for this provision is 37.5% *ad valorem*.

Accordingly, HRL 084361 is modified to reflect the correct classification of boot bottom 6700/6300.

JOHN DURANT,
Director
Commercial Rulings Division

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 957682 DFC
Category: Classification
Tariff No. 6401.99.60 and 9905.64.10

MS. TRACY ANN EHME
A.W. FENTON
1157 Rarig Avenue
Columbus OH 43219–2357

Re: Footwear; boot bottoms, rubber/plastics; GRI 3(c); NAFTA; *United States v. Citroen;* HRL 083931; DD 802426 revoked.

DEAR MS. EHME:

In a letter dated February 24, 1995, on behalf of Rocky Shoes & Boots Co., you asked for clarification of Headquarters Ruling Letter (HRL) 083931, issued to you on June 2, 1989, and DD 802426, issued to you on October 12, 1994, by the Area Director of Customs, J.F.K. Airport, concerning the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS), of rubber/plastic boot bottoms. Samples were submitted for examination.

We have reviewed these rulings and determined that DD 802426 is in error.

Facts:

The footwear involved in DD 802426 was a waterproof polyurethane boot bottom not covering the ankle and not having fasteners or laces.

In HRL 83931, dated June 2, 1989, Customs ruled that certain rubber boot bottoms produced in Korea are classifiable under subheading 6401.99.60, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather, other.

In DD 802426, dated October 12, 1994, the Area Director of Customs, J.F.K. Airport, ruled that a polyurethane boot bottom produced in Canada which is essentially the same as those ruled on in HRL 083931, is classifiable under subheading 6401.99.30, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other, designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather, designed for use without closures.

Issue:

Are the boot bottoms in their condition as imported designed for use without closures and classifiable under subheading 6401.99.30, HTSUS, or are they designed for use with closures and classifiable under subheading 6401.99.60, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes, and, provided such headings or notes do not otherwise require, according to [the remaining GRI's]." In other words, classification is governed first by the terms of the headings of the tariff and any relative section or chapter notes.

Classification of the boot bottoms is based upon their condition as imported. *United States v. Citroen*, 223 U.S. 407 (1911). As the boot bottoms are constructed of rubber/plastics, are waterproof and as imported do not cover the ankle, they are classifiable under subheading 6401.99, HTSUS, which provides for waterproof footwear with outer soles and uppers of rubber or plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes, other footwear, other.

However, classification to the eight digit level is dependent upon whether or not the boot bottoms are designed for use without closures under subheading 6401.99.30, HTSUS, or with closures under subheading 6401.99.60, HTSUS. Inasmuch as we are unable to determine whether the boot bottoms are designed for use without closures or with closures, GRI 3(c), HTSUS, mandates classification of the boot bottoms under subheading 6401.99.60, HTSUS, as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

You also ask that the applicability of subheading 9905.64.10, HTSUS, to the footwear be considered, if Customs agrees that the boot bottoms are classifiable under subheading 6401.90.60, HTSUS.

To be eligible for tariff preferences under the North American Free Trade Agreement (NAFTA), goods must be "originating goods" within the rules of origin set forth in General Note 12(b), HTSUS. You have not submitted sufficient information for us to determine whether the boot bottoms qualify as "originating goods." However, If the boot bottoms qualify as originating goods" pursuant to the NAFTA, they would be eligible for duty-free treatment under subheading 9905.64.10, HTSUS.

Holding:

The boot bottoms are dutiable at the rate of 37.5% *ad valorem* under subheading 6401.99.60, HTSUS.

Accordingly, DD 802426 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF AN ORGANIZER/ADDRESS BOOK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an organizer/address book. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before May 12, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482–7059.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an organizer/address book.

In New York Ruling Letter (NYRL) 864822, dated July 5,1991, a looseleaf book consisting of a metal six ring binder with paper inserts comprising a daily planning system was classified in subheading 4820.10.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides in part for articles similar to diaries, notebooks and address books. This ruling letter is set forth in Attachment A to this document.

However, Customs has concluded that the classification of the planner in subheading 4820.10.4000, HTSUS, is in error. Customs is of the opinion that the organizer is classifiable in subheading 4820.10.2010, HTSUS, which provides for bound diaries, notebooks and address books. Customs intends to modify NYRL 864822 to reflect the proper classification of the merchandise in subheading 4820.10.2010, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking NYRL 864822 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 24, 1995.

CYNTHIA REESE,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 5, 1991.

CLA48:S:N1:234 864822
Category: Classification
Tariff No. 4820.10.4000

MS. RUBY L. WOOD
EVANS AND WOOD & CO., INC.
P.O. Box 610005
D/FW Airport, TX 75261

Re: The tariff classification of an organizer/address book from Taiwan.

DEAR MS. WOOD:

In your letter dated June 25, 1991, on behalf of Hobby Lobby Stores Inc. (Oklahoma City, OK), you requested a tariff classification ruling.

A sample was submitted and will be retained for reference. It is a 2 × 10 × 17 cm loose-leaf book consisting of a metal six-ring binder, complete with pages (paper inserts), permanently mounted inside a cover made essentially of plastic and cotton fabric.

The pages are, for the most part, blank sheets that are lined and captioned to permit written entries of various kinds. With the aid of tabbed dividers, they are grouped into a number of different sections, including those for yearly, weekly and daily planning, notes, and telephone/address listings. A few pages are printed with handy reference information, such as a world time chart, a calorie/carbohydrate guide, and a 1991–1992 calendar.

The inside of the cover is fitted with an inexpensive ball-point pen, and also incorporates pockets for carrying business cards and loose papers. In addition, the book features a strap/snap closure.

The applicable subheading for the organizer/address book will be 4820.10.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. The rate of duty will be free.

We note that the sample is not marked with its country of origin. The articles will be required to be so marked upon importation into the United States.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations *(19 C.F.R. 177)*.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957667 ch
Category: Classification
Tariff No. 4820.10.2010

RUBY L. WOOD
EVANS AND WOOD & CO., INC.
P.O. Box 610005
D/FW Airport, TX 75261

Re: Modification of NYRL 864822; tariff classification of diaries, notebooks and address books, bound.

DEAR MS. WOOD:

New York Ruling Letter (NYRL) 864822, dated July 5,1991, concerned the classification of an organizer/address book under the Harmonized Tariff Schedule of the United States (HTSUS). We have had occasion to review this ruling and find that the classification of this article under subheading 4820.10.4000, HTSUS, is in error.

Facts:

In NYRL 864822, the subject merchandise was described as follows:

> It is a 2 × 10 × 17 cm looseleaf book consisting of a metal six ring binder, complete with pages (paper inserts), permanently mounted inside a cover made essentially of plastic and cotton fabric.
>
> The pages are, for the most part, blank sheets that are lined and captioned to permit written entries of various kinds. With the aid of tabbed dividers, they are grouped into a number of different sections, including those for yearly, weekly and daily planning, notes, and telephone/address listings. A few pages are printed with handy reference information, such as a world time chart, a calorie/carbohydrate guide, and a 1991–1992 calendar.
>
> The inside of the cover is fitted with an inexpensive ball point pen, and also incorporates pockets for carrying business cards and loose papers. In addition, the book features a strap/snap closure.

In NYRL 864822, the article was classified under subheading 4820.10.4000, HTSUS, as an article similar to a diary.

Issue:

Whether the subject merchandise is classifiable in subheading 4820.10.2010, HTSUS, which provides for diaries, notebooks and address books, bound; or subheading 4820.10.4000, HTSUS, which encompasses in part articles similar to diaries, notebooks and address books, and unbound diaries, notebooks and address books?

Law and Analysis:

Following the enactment of the HTSUS in 1989, the Area Director of Customs, New York Seaport, issued a number of ruling letters in which merchandise described as organizers, planners, agendas or engagement calendars were not regarded as diaries. At that time, the provision for diaries was reserved for books used as personal journals and suitable for extensive notations or narratives. As the submitted sample was not suitable for these purposes, it was classified as an article similar to a diary.

However, these early decisions were superseded by a series of rulings from Customs headquarters. *See* Headquarters Ruling Letter (HRL) 089960, dated February 10,1992; HRL 952691, dated January 11,1993; HRL 953172, dated March 19,1993; HRL 953413, dated March 29,1993; HRL 955253, dated November 10, 1993; HRL 955199, dated January 24,1994. The headquarters decisions made reference to the *Compact Edition of the Oxford English Dictionary* (1987), which defined the term "diary" as:

> 2. A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit.

Based upon this language, engagement books, agendas, organizers and planners designed primarily for the receipt of daily memoranda and jottings were classified as diaries.

Furthermore, in recent rulings we have made reference to judicial authority in this area. For example, in *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), the merchandise was described in part as a:

> [P]lastic covered book, approximately 4¼ by 7⅜ inches in dimensions. Its first few pages contain, successively, the date "1961," the notation "Personal Memoranda," calendars for the years 1960, 1961, and 1962, and a few statistical tables. The following 20-odd pages contain spaces for addresses and telephone numbers, each page more or less set aside for each letter of the alphabet. The remaining portion of the book consists of ruled pages allocated to the days of the year and the hours of the day and each headed with calendars for the current and following months. A blank-lined page, inserted at the end of each month's section, is captioned "Notes."

In *Baumgarten*, the Court observed that:

> [T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations; and, in this respect, the books here in issue are well described. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

Accordingly, the Court classified an appointment/telephone book with calendars and statistical information as a diary.

Similarly, in *Brooks Bros. v. United States*, 68 Cust Ct. 91 (1972), the submitted sample was an 8 inch by 10 inch *spiral bound* leather book which included pages suitable for use as a diary, but also possessed a significant amount of printed informational material. Citing *Baumgarten*, the Court noted that the "particular distinguishing feature of a diary is its suitability for the receipt of daily notations." As the informational material did not alter the essential nature of the article, it was classified as a diary.

In light of the foregoing administrative and judicial precedent, we conclude that the instant merchandise is properly classifiable as a diary, as the article functions primarily as a place for the receipt of daily notations. Diaries are classifiable in subheading 4820.10.2010, HTSUS, if they are regarded as bound. However, unbound diaries devolve to subheading 4820.10.4000, HTSUS. In HRL 955516, dated April 8, 1994, we stated that:

> As the "Filofax" diaries contain ring binders that hold loose sheets in place, they are undoubtedly classifiable within heading 4820, HTSUSA. The next issue is whether ring binders make a diary "bound" so as to warrant classification within subheading 4820.10.2010, HTSUSA. This office has consistently held that they do. *See* HRL 089960 (2/10/92; 952691(1/11/93); and 953172(3/19/93). This position is supported by the EN to heading 4820, HTSUSA, which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." It is clear that metal binders were contemplated to fit within this heading's definition of bound articles. We do not agree with protestant's argument that merely because a metal loose leaf ring binder was not expressly cited as an exemplar of a "bound" article in the EN to heading 4820, that it is precluded from classification as such.

Accordingly, Customs has determined that diaries incorporating ring binders are regarded as bound for classification purposes. *See also* HRL 957148, dated October 21, 1994; HRL 955937, dated October 21, 1994. Based on our administrative precedent, the subject merchandise is classifiable as a bound diary of subheading 4820.10.2010, HTSUS.

In a submission, dated February 17, 1995, filed in connection with another matter, you contend that loose sheets of paper secured by means of spiral or metal fasteners are not "bound," as that term is used in heading 4820. You argue that prior administrative decisions in this area do not constitute "legal argument" and imply that they should be disregarded. However, pursuant to Customs Regulation 177.9(a) (19 CFR 177.9(a)), a principle set forth in previous ruling letters may be cited as authority in the disposition of transactions involving the same circumstances. Consequently, we regard the prior ruling letters in this area as legally significant.

Citing lexicographic sources, you note that the term "bound" is associated with words such as "secured," "firm or fast," "fastened," "tied." On the other hand, the term loose connotes "flexible," "changeable," "unfettered," "free." You assert that looseleaf and spiral fasteners do not secure paper inserts. Rather, they allow their contents to be flexible or

changeable. Consequently, you reason that diaries possessing looseleaf or spiral fasteners should be regarded as unbound.

However, ring and spiral fasteners function to secure their contents. They are in fact designed to hold paper in place. In this regard, we direct your attention to subheading 4820.30, HTSUS, which provides in part for binders. The Explanatory Note to the heading, at page 687, states that the heading includes:

> *Binders for holding loose sheets,* magazines, or the like *(e.g. clip binders, spring binders, screw binders, ring binders).* (Emphasis added).

Thus, heading 4820 specifies that the term "binders" include ring binders, and by implication spiral binders, designed for holding loose sheets. The note makes it clear a "binder" is not limited to more traditional bookbinding.

You claim that the term "binders" should be distinguished from the term "bound," as the latter is used in a more limited sense elsewhere in the Note. However, there is no indication that the Explanatory Note draws such a distinction. For this reason, we are of the opinion that the terms "binders" and "bound" should be interpreted in a manner consistent with one another. Thus, loose sheets of paper held together in a looseleaf binder are regarded as bound for classification purposes.

As noted above, the Explanatory Note to heading 4820, at page 687, states that:

> The goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc.

The first portion of this passage indicates that goods of the heading may be bound with materials other than paper, such as leather, plastics or textile material. It is important to recognize that these binding materials are merely examples and do not purport to be all inclusive. We have concluded that a ring binder is such a binding material. The second part of the passage goes on to state that goods of the heading may have reinforcements or fittings of such materials as metal or plastics. A metal ring binder may also be regarded as a metal fitting.

You have identified bound articles possessing metal fittings. Specifically, you observe that bound ledgers and manuals may possess metal fittings for the purpose of placing them on racks. We agree that bound goods of heading 4820 may possess extraneous fittings of metal. However, this point does not bear on the issue of whether a metal binder constitutes binding material. In addition, you have not indicated why a metal ring binder may not also be regarded as a metal fitting. Therefore, we see no need to disturb our findings in this area.

Our attention is also directed to subheading 4820.10.4000, HTSUS, which encompasses in part unbound diaries. You contend that under Customs analysis, the subheading would essentially be an empty provision. Subheading 4820.10.4000, HTSUS, is a residual provision for certain stationery articles and would describe items such as registers and account books. In addition, we note that the breakout for bound diaries occurs at the eight-digit national classification level. National breakouts were frequently inserted into the HTSUS to carry over the tariff treatment of identical merchandise from the prior tariff, the Tariff Schedule of the United States (TSUS). Item 256, TSUS, provided in part as follows:

Blank books, bound	
256.56	Diaries, notebooks and address books * * * .4%
256.58	Other * * * Free

Thus, under the TSUS, articles classifiable as diaries, notebooks and address books were required to be bound. We have been advised that under the TSUS spiral and ring bound diaries were classified in item 256.56, TSUS. It should be noted that in *Brooks Bros., supra.*, a spiral bound leather book was classified as a bound diary. Therefore, our findings in this area are in accord with past Customs practice.

Holding:

NYRL 864822, dated July 5, 1991, is hereby modified. The subject merchandise is classifiable under subheading 4820.10.2010, HTSUS, which provides for bound diaries, notebooks and address books. The applicable rate of duty is 3.6 percent *ad valorem.*

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF FOOT FILES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke and modify rulings pertaining to the tariff classification of foot files for exfoliating skin. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before May 12, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC, 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7063 or 7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke and modify rulings pertaining to the tariff classification of foot files.

New York (NY) 880199 dated December 3, t992, issued by the Area Director, New York Seaport, classified the "Glorious Foot File" under subheading 6804.30.00, HTSUS, as hand sharpening or polishing stones. This ruling letter is set forth in "Attachment A" to this document.

District Director (DD) 889232 dated September 1, 1993, issued by the Area Director, JFK Airport, classified a foot file from Sweden under subheading 6805.30.50, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials. This ruling letter is set forth in "Attachment B" to this document.

Customs Headquarters is of the opinion that the foot file in NY 880199 is classified under heading 6805, HTSUS, as natural or artificial

abrasive powder or grain. Classification to the eight digit level is dependant upon the type of base onto which the abrasive material is coated. Additionally, we are of the opinion that the foot file in DD 889232 is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only, because the abrasive material is coated onto a paper/paperboard base. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 957756 revoking NY 880199 is set forth in "Attachment C", and proposed HRL 957398 modifying DD 889232 is set forth in "Attachment D" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 24, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 3, 1992.

CLA-2-68:S:N:N3D:226 880199
Category: Classification
Tariff No. 6804.30.00

MR. STEVEN WAZLAVEK
2670 Timberline Rd.
Marietta, GA 30062

Re: The tariff classification of an abrasive article from Sweden.

DEAR MS. WAZLAVEK:

This is in response to your request for a tariff classification ruling dated November 5, 1992.

You have submitted a sample, the "Glorious Foot File," which appears to be a piece of plastic which has an oval shape at one end and a handle at the other end. The oval portion is concave on one side and convex on the other. Both sides of the oval are coated with an abrasive. You have stated that the principal use of this item is to smooth and soften rough skin. We consider the essential character of your product to be the abrasive rubbing surface.

The provision applicable to the "Glorious Foot File" will be subheading 6804.30.00, Harmonized Tariff Schedule of the united States (HTS), which provides for millstones, grindstones, grinding wheels and the like, without frameworks, for grinding, sharpening, polishing, trueing or cutting, * * * of natural stone, of agglomerated natural or artificial abrasives, or of ceramics * * *: Hand sharpening or polishing stones. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Jamaica, NY, September 1, 1993.
CLA–2–68:K:C:A2:DO8 889232
Category: Classification
Tariff No. 6805.30.5000

MR. STEVEN WAZLAVEK
MBODI INTERNATIONAL INC.
2550 Sandy Plains Road, Suite 320
Atlanta, GA 30066

Re: The tariff classification of a foot file from Sweden.

DEAR MR. WAZLAVEK:

In your letter dated August 9, 1993 you requested a classification ruling.

Submitted with your letter was a sample of a foot file. The sample consists of a flat plastic handle which extends outward to form a base for an abrasive sandpaper. Both sides are covered with this abrasive paper. You state in your letter that these items are principally used to smooth and soften rough or hardened skin.

The applicable subheading for the foot file will be 6805.30.5000, Harmonized Tariff Schedule of the United States which provides for natural or artificial abrasive powder or grain * * * on a base of other materials * * * other. The rate of duty will be Free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported if the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

THOMAS MATTINA,
Area Director,
JFK Airport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC
CLA–2 CO:R:C:M 955756 KCC
Category: Classification
Tariff No. 6805.20.00 and 6805.30.50

MR. STEVEN WAZLAVEK
2670 Timberline Rd.
Marrietta, GA 30062

Re: NY 880199 revoked; foot file; 6804.30.00; hand sharpening or polishing stones; EN 68.04; base; EN 68.05; HRL 955223; 955575 and 951607.

DEAR MR. WAZLAVEK:

This is in regards to New York (NY) 880199 issued to you on December 3, 1992, by the Area Director, New York Seaport, which classified the "Glorious Foot File" from Sweden

under subheading 6804.30.00, Harmonized Tariff Schedule of the United States (HTSUS), as hand sharpening or polishing stones. We have reviewed that ruling and are of the opinion that classification under subheading 6804.30.00, HTSUS, is incorrect.

Facts:

In NY 880199 the foot file was described as follows:

> You have submitted a sample, the "Glorious Foot File," which appears to be a piece of plastic which has an oval shape at one end and a handle at the other end. The oval portion is concave on one side and convex on the other. Both sides of the oval are coated with abrasive. You have stated that the principal use of this item is to smooth and soften rough skin.

Issue:

Is the "Glorious Foot File" classified under subheading 6804.30.00, HTSUS, as hand sharpening or polishing stones, or under heading 6805, HTSUS, as natural or artificial abrasive powder or grain?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The competing subheadings are as follows:

6804	Millstones, grindstones, grinding wheels and the like, without frameworks, for grinding, sharpening, polishing, trueing or cutting, hand sharpening or polishing stones, and parts thereof of natural stone, of agglomerated natural or artificial abrasives, or of ceramics, with or without parts of other materials * * *
6804.30.30	Hand sharpening or polishing stones.
6805	Natural or artificial abrasive powder or grains, on a base of textile material, of paper, of paperboard or of other materials, whether or not cut to shape or sewn or otherwise made up * * *
6805.20.00	On a base of paper or paperboard only
6805.30.10	On a base of other materials * * * Other.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See, T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 68.04 (pgs. 872–900) states, in pertinent part, that:

> (3) *Grinding wheels, heads, discs, points, etc.* as used on machine-tools, electro-mechanical or pneumatic hand tools, for the trimming, polishing, sharpening, trueing or sometimes for the cutting of metals, stone, glass, plastics, ceramics, rubber, leather, mother of pearl, ivory, etc. * * *
>
> The heading covers such tools not only when they are predominantly of abrasive materials, but also when they consist * * * of a centre or core of rigid material (metal, wood, plastics, cork, etc.) on to which compact layers of agglomerated abrasive have been permanently bonded. * * *
>
> Agglomerated grinding wheels, etc., are made by mixing ground abrasive or stone with binders such as ceramic materials (for example, powdered clay or kaolin, sometimes with added felspar), sodium silicate, cement (especially magnesian cement) or less rigid cementing materials (such as rubber, shellac or plastics). Textile fibres such as cotton, nylon or flax are sometimes incorporated in the mixtures. The mixtures are moulded to shape, dried, and then heated (if necessary to the stage of vitrification in the case of ceramic binders) or cured (in the case of the rubber, plastics, etc., binders). The articles are then trimmed to size and shape * * *
>
> The heading *does not include:* * * *
>
> (b) Natural or artificial abrasive powder or grain coated on to textile material, paper, paperboard or other materials *(heading 68.05),* whether or not the textile material, paper, etc., is subsequently glued on to supports such as discs or strips of wood (buffsticks for use in the clock and watch industry, mechanical engineering, etc.).

EN 68.05 (pg. 901) for natural or artificial abrasive powder or grain states, in pertinent part, that:

> This heading covers textile material, paper, paperboard, vulcanised fibre, leather or other materials, in rolls or cut to shape (sheets, bands, strips, discs, segments, etc.), or in threads or cords, on to which crushed natural or artificial abrasives have been coated, usually by means of glue or plastics. The heading also covers similar products of nonwovens, in which abrasives are uniformly dispersed throughout the mass and fixed on to textile fibres by the binding substance. The abrasives used include emery, corundum, silicon carbide, garnet, pumice, flint, quartz, sand and glass powder. The bands, discs, etc., may be sewn, stapled, glued or otherwise made up; * * * But the heading *excludes* grinding wheels composed of a rigid support (e.g., of paperboard, wood, metal) fitted with a compact agglomerated layer, rather than powder or grain, of abrasive, and similarly constituted hand tools *(heading 68.04)*.

It is our opinion that the foot file is provided for under heading 6805, HTSUS. EN 68.05 specifically describes the foot file at issue. The foot file consists of a base coated with abrasive material. In this case, it is unclear what the actual base is composed of. If the abrasive material is directly coated onto something other than woven textile fabric or paper/paperboard, *i.e.*, plastic, the foot file is classified under subheading 6805.30.50, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials.

However, if the abrasive material is coated onto paper or paperboard and then attached to the plastic, the foot file is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only. The secondary base, *i.e.*, the plastic handle, is not the base we examine for tariff classification purposes. EN 68.05 states that abrasive coated material "may be sewn, stapled, glued or otherwise made up * * *." *See,* Headquarters Ruling Letter (HRL) 951607 dated July 13, 1992, and HRL 955223 dated December 8, 1993 (modified in HRL 955575 dated December 22, 1993). In this situation, the abrasive material, *i.e.*, abrasive sandpaper, would be made up onto the plastic handle.

The foot file is not provided for under subheading 6804.30.00, HTSUS. EN 68.04 states that heading 6804, HTSUS, covers actual agglomerated material which has been molded to shape and heated or cured. As previously stated, the material at issue is plastic or paper/paperboard which is coated with abrasive material. Moreover, EN 68.04 states that abrasive powder or grain coated on to a material which is subsequently glued on to supports such as discs is excluded from classification under heading 6804, HTSUS, but is classifiable under heading 6805, HTSUS. The foot file is not of the class or kind of hand sharpening or polishing stones classifiable under heading 6804, HTSUS.

Holding:

If the "Glorious Foot File" is composed of abrasive material coated onto paper or paperboard which is attached to the plastic, it is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only. Articles classified under this tariff provision are dutiable at the rate of 2 percent *ad valorem*.

If the "Glorious Foot File" is composed of abrasive material coated onto a material other than woven textile fabric or paper/paperboard, it is classified under subheading 6805.30.10, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials. Articles classified under this tariff provision enter the U.S. duty-free.

NY 880199 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:M 957398 KCC
Category: Classification
Tariff No. 6805.20.00

MR. STEVEN WAZLAVEK
MBODI INTERNATIONAL INC.
2550 Sandy Plains Road, Suite 320
Atlanta, GA 30066

Re: DD 889232 modified; foot file; 6805.30.50; on a base of paper or paperboard only; EN 68.05; base; HRL 951607, 955223 and 955575.

DEAR MR. WAZLAVEK:

This is in regards to District Director (DD) 889232 issued to you on September 1, 1993, by the Area Director, JFK Airport, which classified a foot file from Sweden under subheading 6805.30.50, Harmonized Tariff Schedule of the United States (HTSUS), as natural or artificial abrasive powder or grain, on a base of other materials. We have reviewed that ruling and are of the opinion that classification under subheading 6805.30.50, HTSUS, is incorrect.

Facts:

The foot file was described in DD 889232 as follows:

> The sample consists of a flat plastic handle which extends outward to form a base for an abrasive sandpaper. Both sides are covered with this abrasive paper. You state in your letter that these items are principally used to smooth and soften rough or hardened skin.

Issue:

Is the foot file classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only, or under subheading 6805.30.50, HTSUS, as natural or artificial abrasive powder or grain, on a base of other materials?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The competing subheadings are as follows:

6805	Natural or artificial abrasive powder or grains, on a base of textile material, of paper, of paperboard or of other materials, whether or not cut to shape or sewn or otherwise made up * * *
6805.20.00	On a base of paper or paperboard only.
6805.30.50	On a base of other materials * * * Other

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See, T.D. 89-80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 68.05 (pg. 901) for natural or artificial abrasive powder or grain states, in pertinent part, that:

> This heading covers textile material, paper, paperboard, vulcanised fibre, leather or other materials, in rolls or cut to shape (sheets, bands, strips, discs, segments, etc.), or in threads or cords, on to which crushed natural or artificial abrasives have been coated, usually by means of glue or plastics. The heading also covers similar products of nonwovens, in which abrasives are uniformly dispersed throughout the mass and fixed on to textile fibres by the binding substance. The abrasives used include emery, corundum, silicon carbide, garnet, pumice, flint, quartz, sand and glass powder. The bands, discs, etc., may be sewn, stapled, glued or otherwise made up * * *.

The foot file consist of paper coated with abrasive material which makes abrasive sandpaper. This abrasive sandpaper is then placed over both sides of a plastic handle for use. In this case, the actual base for the abrasive material is the paper. The secondary base, *i.e.*, the plastic handle, is not the base we examine for tariff classification purposes. EN 68.05 states that abrasive coated material "may be sewn, stapled, glued or otherwise made up * * *." *See*, Headquarters Ruling Letter (HRL) 951607 dated July 13, 1992, and HRL 955223 dated December 8, 1993 (modified in HRL 955575 dated December 22, 1993). In this case, the abrasive material, *i.e.*, abrasive sandpaper, is made up onto the plastic handle. Therefore, we are of the opinion that the foot file is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only.

Holding:

The foot file is classified under subheading 6805.20.00, HTSUS, as natural or artificial abrasive powder or grain, on a base of paper or paperboard only. The corresponding duty rate for articles classified under this provision is 2 percent *ad valorem*.

DD 889232 is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, March 24, 1995.

The following document of the United States Customs Service, Office of Regulations and Rulings, *Notice of Issuance of Final Determination Concerning Country of Origin Marking Requirements for Auto/Marine Adapters* having been published in the Federal Register (Vol. 60, No. 41, page 11697) on March 2, 1995 is hereby published in the CUSTOMS BULLETIN together with related document, U.S. Customs Service Headquarters ruling letter 735346 of February 23, 1995.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING AUTO/MARINE ADAPTERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that Customs has issued a final determination concerning the country of origin of certain auto/marine adapters which are being offered to the U.S. Federal Bureau of Investigation ("FBI") in a procurement designated under FBI Solicitation No. 6178. The final determination found that based upon the facts presented, the country of origin of auto/marine adapters is the U.S. (Scenario I) and the Netherlands (Scenario II).

DATES: The final determination was issued on February 23, 1995. Any party-at-interest, as defined at 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of March 2, 1995.

ADDRESSES: Copies of the nonconfidential portions of this final determination may be obtained by writing or calling the Legal Reference Staff, Office of Regulations And Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229; (202) 482–6906.

FOR FURTHER INFORMATION CONTACT: Anthony A. Tonucci, Attorney-Advisor, Office of Regulations and Rulings, (202) 482–7073.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on February 23, 1995, pursuant to Subpart B of Part 177, Customs Regulations (19 CFR Part 177, Subpart B), Customs issued a final determination concerning the country of origin of certain auto/marine adapters which are being offered to the FBI in a procurement designated under FBI Solicitation No. 6178. The U.S. Customs ruling number is HQ 735346. This final determination was issued at the request of one of the offerors under procedures set forth at 19 CFR 177 subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). The final determination concluded that based upon the facts presented: (1) Taiwanese DC to DC converters are substantially transformed in the U.S. (Scenario I) and the Netherlands (Scenario II) as a result of being further processed and assembled with other components into auto/marine adapters; (2) Taiwanese DC to DC converters and the other components which are of U.S. origin also are substantially transformed in the Netherlands as a result of being further processed and assembled into auto/marine adapters. Accordingly, the country of origin of the auto/marine adapters is the U.S. (Scenario I) and the Netherlands (Scenario II).

This document gives notice pursuant to section 177.29, Customs Regulations, (19 CFR 177.29), of that final determination. Any party-at-interest, as defined at 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of March 2, 1995.

Dated: February 23, 1995.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 2, 1995 (60 FR 11697)]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 23, 1995.

MAR–2–05 CO:R:C:S 735346 AT
Category: Marking

KEVIN P. CONNELLY, ESQ.
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
815 Connecticut Avenue, N.W.
Washington, DC 200006–4004

Re: U.S. Government Procurement; final determination—concerning the country of origin of auto/marine adapters for computers; substantial transformation; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, Customs Regulations (19 CFR 177.21 *et seq.*).

DEAR MR. CONNELLY:

This is in response to your request dated August 31, 1993, as supplemented on April 28, 1994, for a final determination under Subpart B of Part 177, Customs Regulations (19 CFR 177.21 *et seq.*). Under these regulations, which implement Title III of the Trade Agree-

ments Act of 1979, as amended (19 U.S.C. 2511 et seq.), the Customs Service issues country of origin advisory rulings and final determinations as to whether, for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, an article is or would be a product of a designated foreign country or instrumentality.

This final determination concerns the country of origin of certain auto/marine adapters for computers which are being offered to the U.S. Federal Bureau of Investigation ("FBI") in a procurement designated under FBI Solicitation No. 6178, also referred to as "the solicitation". You are counsel to Laptops, Etc. ("Laptops"), a U.S. company that will either manufacture or import the auto/marine adapters in question. Accordingly, Laptops is a party-at-interest within the meaning of 19 CFR 177.22(d)(1), and is entitled to request this final determination.

A conference was held at Customs Headquarters on June 7, 1994, with representatives from Customs, Laptops and yourself to further discuss the assembly operations of the auto/marine adapter. On June 9, 1994, supplemental information detailing the assembly operation of the auto/marine adapter was submitted in furtherance of that meeting.

Contained in your submissions is material which you claim as business proprietary information and request that Customs make no public disclosure of this information. We have agreed to your request. The confidential information is bracketed and will not be disclosed in copies of this final determination made available to the public. Should other persons request public disclosure of the information under the Freedom of Information Act or otherwise, this office will provide you with the opportunity to defend your interests in confidential treatment.

Facts:

Your submission states that Laptops intends to either manufacture auto/marine adapters in the U.S. or import auto/marine adapters from a vendor that manufactures the merchandise in the Netherlands to sell to the FBI under the solicitation. The FBI plans to use the auto/marine adapter in conjunction with a laptop computer. The auto/marine adapter is plugged into a cigarette lighter (or equivalent) on a boat or automobile and is also connected to a laptop. The laptop user may then use the auto/marine adapter to recharge the laptop's batteries or as a power source in which case the user may work on the laptop while it is connected to the auto/marine adapter.

The parts and components used in the United States (the Netherlands in Scenario II) in the production of auto/marine adapters consist of the following:

1. The Voltage Regulator Subassembly—consists of the DC to DC converter, Power Interface Board Assembly and Power Distribution Board Assembly.

a. The DC to DC converter, converts 9 to 24 volt input to 12 volt output. The voltage may vary according to the voltage requirement of the laptop.

b. The Power Interface Board Assembly (PIBA), which is attached to the DC to DC converter provides for power input from the Cigarette Adapter Cable.

c. The Power Distribution Board Assembly (PDBA), which is attached over the PIBA provides the tnterface with power management and distribution functions of the auto/marine adapter. The PDBA interfaces with the Computer Adapter Cable's power output function.

2. Cigarette Adapter Cable—a subassembly which plugs into the cigarette lighter to receive power. The LED light is activated when the connection is made. The other end of the adapter cable is one inch of exposed wire which is soldered to the DC to DC converter. The parts which make up this subassembly consist of (1) 5 foot, 18 AWG, 2 conductor, 105C, insulated electrical wire; (2) cigarette adapter connector: and (3) strain relief plug.

3. Computer Adapter Cable—a subassembly in which one end is plugged into the laptop and the other is soldered to the DC to DC converter. The parts which make up this subassembly consist of: (1) 5 foot, 18 AWG, 2 conductor, 105C, insulated electrical wire; (2) Barrel connector, center positive, ¼" OD ⅛" ID; (3) ferrIte component (used to reduce radio and electrical frequency interference).

4. LED Board Subassembly (LEDBSA)—indicates the power-up condition of the auto/marine adapter. The LEDBSA is attached to the PDBA and fits into a recessed socket in the adapter case.

5. Adapter case—Case that encases the electronic components of the auto/marine adapter, and protects the components from the environment.

6. 10 K Trimpot—Adjusts the voltage for precise voltage conversion. This pan is critical in preventing damage to the laptop computer when used with the auto/marine adapter. The 10 K Trimpot is an integral part of the PBDA.

You state that the DC to DC converter is manufactured in Taiwan, while the remainder of the components and component parts are manufactured in the U.S. (Scenario I) or the Netherlands and/or U.S. (Scenario II).

You indicate that the entire processing/assembly operation and testing of each auto/marine adapter takes approximately [ ]. You also indicate that the DC to DC converter is the single most expensive component of the auto/marine adapter, representing approximately 72 percent of the total manufacturing costs of the auto/marine adapter. Furthermore, it is your understanding that the DC to DC converter is classified under subheading 8536.69.0060 HTSUS while the auto/marine adapter is classified under subheading 8504.40.0004.

The two scenarios for which you have requested a final determination are described below:

SCENARIO I

In Scenario I, [ ] ships DC to DC converters of Taiwanese origin to its California location [ ] subsequently will ship the converters to Laptops from the California location as Laptops orders these items. Laptops places the DC to DC converters into inventory after the items pass receiving inspection.

Laptops acquires U.S. origin LED lights, adapter cases, ferrite components, 10 K trimpots, fuses, cigarette adapter connectors, strain relief plugs, 18 AWG wire, barrel connectors, lens covers, and other U.S. origin parts from multiple U.S. suppliers. After passing through receiving inspection, Laptops places these items into inventory. After receiving an order for an auto/marine adapter, Laptops pulls the parts from inventory and again visually inspects all parts for defects.

Laptops next manufactures the Computer Adapter Cable and Cigarette Adapter Cable subassemblies from parts pulled from inventory. This process consists of [ ]. Then wires 1 and 2 are tested for conductivity. wires that fail the conductivity test are scrapped. In the event that wire 1 passes, it becomes a computer adapter cable. In the event wire 2 passes, it becomes a cigarette adapter cable.

Laptops next works on the voltage regulator subassembly. After visually inspecting the DC to DC converter and testing the converter with the multimeter for continuity, the manufacture of the Power Interface Board Assembly occurs. This consists of [ ]. At the conclusion of these operations, the DC to DC converter, Power Interface Board Assembly and Power Distribution Board Assembly are in a fully integrated finished form and stocked as a single unit subassembly, known as the Voltage Regulator Subassembly.

Next, the cigarette adapter is soldered to the Power Interface Board Assembly (PIBA) portion of the Voltage Regulator Subassembly. This consists of [ ]. Following this operation, the Computer Adapter Cable is soldered to the Power Distribution Board Assembly (PDBA). This consists of [ ]. Then the LED Board Subassembly is soldered to the Voltage Regulator Subassembly. This involves [ ]. This light will light up when the auto/marine adapter is plugged into a power source.

After these operations are completed, the various subassemblies are assembled together creating the auto/marine adapter. First [ ]. Six screws are installed into sockets which are checked for proper torque, fit and seal of the case. Subsequently, the completed auto/marine adapter is visually inspected and tested for correct voltage.

SCENARIO II

The process in Scenario II is identical to Scenario I, with the exception that the steps performed in the United States in Scenario I, are to be performed in the Netherlands by a company from which Laptops will import the auto/marine adapters. The DC to DC converter is still of Taiwanese origin, with all other parts and components of the auto/marine adapter manufactured in the Netherlands (or potentially in the United States). The manufacture of the Cigarette Adapter Cable, as well as the Computer Adapter Cable is to be performed in the Netherlands.

In conclusion, you assert that the assembly processes described above result in a substantial transformation of the DC to DC when used in the production of auto/marine adapters in the United States (Scenario I) and the Netherlands (Scenario II).

Issue:

Do the assembly operations performed in the two scenarios stated above effect a substantial transformation of the Taiwanese DC to DC converter such that the auto/marine adapter may be considered as a product of the U.S. (Scenario I) or the Netherlands (Scenario II).

Law and Analysis:

As prescribed under Title III of the Trade Agreements Act, the origin of an article not wholly the growth, product, or manufacture of a single country is to be determined by the rule of substantial transformation. 19 U.S.C. 2518(4). Such an article is not a product of a country unless it has been substantially transformed there into a new and different article of commerce with a name, character, or use different from that of the article or articles from which it was transformed.

SUBSTANTIAL TRANSFORMATION APPLIED TO SCENARIO I AND II

The inquiry must resolve whether, under the two scenarios, the processing performed in the U.S. (Scenario I) or the Netherlands (Scenario II) results in an article having a new name, character or use. A secondary, supporting inquiry is whether the operations are complex, require skill, entail expense, or add value; these findings are ordinarily corroborative of the new name, character or use finding. In our experience, these inquiries are highly fact-and-product specific; generalizations are troublesome and potentially misleading. The determination is in this instance "a mixed question of technology and customs law, mostly the latter." *Texas Instruments, Inc. v. United States,* 681 F.2d. 778, 783 (C.C.P.A. 1982).

In making this final determination we must rely upon the judicial and administrative precedents that have considered the issue of substantial transformation.

As stated in your submission, U.S. components and a Taiwanese D.C. to D.C. converter (Scenario I) or Netherlands (or possibly U.S.) components and a Taiwanese D.C. to D.C. converter (Scenario II) will be further processed and assembled into auto/marine adapters in the respective countries. Thus, the critical issue that must be addressed in determining the country of origin of the auto/marine adapters is whether the Taiwanese DC to DC converter is substantially transformed as a result of the operations performed in one of the two countries. That is, does the name, character or use of the converter change as a result of the processing and assembly operations performed to manufacture the auto/marine adapter in the U.S. or the Netherlands.

The DC to DC converter is the single most expensive component of the auto/marine adapter, representing approximately 72 percent of the total manufacturing costs of the auto/marine adapter. The converter is also a significant component of the auto/marine adapter.

In *National Hand Tool Corp., v. United States,* Slip Op. 92–61 (April 27, 1992), *aff'd,* 989 F.2d 1201 (1993), the Court of International Trade held that imported hand tool components which were used to produce flex sockets, speeder handles and flex handles were not substantially transformed when further processed and assembled in the U.S. One of the factors considered by the court in reaching its conclusion was that the name of the imported components did not change as a result of the U.S. processing and assembling operations. The court found that the name of each article imported had the same name in the completed tool. In support of this conclusion, the court cited the following example:

> For example, when the lug or "G-head", component of a flex handle imported from Taiwan (Ex. E) was shown, plaintiffs witness called it a "G-head." When the government counsel asked the name of the part where the lug component is attached to a completed flex handle (Ex. J.), the witness also called it a "G-head."

The court also considered whether the use of the imported components changed as a result of the prooessing and assembling operations performed in the U.S. In finding that the use of the imported components did not change, the court Stated that the use of the imported articles was predetermined at the time of importation due to the fact that each component was intended to be incorporated in a particular finished mechanics hand tool. Although the court recognized the fact that only one predetermined use of imported articles does not preclude the finding of substantial transformation *(See, Torrington Co. v. United States,* 764 F.2d. 1563 (1985)), it went on to say that the determination of substantial transformation must be based on the totality of the evidence.

Based upon the totality at the evidence in this case, we find that the DC to DC converter is substantially transformed in the U.S. (Scenario I) or the Netherlands (Scenario II) as a result of the processing and assembly operations performed there.

Unlike the imported hand tool components in *National Hand Tool*, the name of the DC to DC converter changes as a result of the processing and assembly operations in that it is a DC to DC converter before, and a part of an auto/marine adapter after, processing and assembly. We note however, that the courts have held that a change in the name of the article is the weakest evidence of a substantial transformation. *See, Uniroyal, Inc.. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), aff'd., 702 F. 2d 1022 (Fed. Cir. 1983).

The use of the DC to DC converter also changes as a result of the processing and assembly operations performed. The purpose of the auto/marine adapter is to supply regulated DC power from a variety of DC power sources (i.e., motorcycle, boat, airplane, or auto batteries), ranging from 9 to 24 volts, to a portable laptop computer requiring a specific voltage and current. The adapter functions as a voltage and current regulator for the portable computer by limiting the amount of voltage/current that is passed through the adapter to the computer. The purpose of this function is to deliver constant and steady power required by the computer for proper operation.

As imported, the output of the DC to DC converter cannot be used as a main power source to the computer source because the voltages vary with each converter model. If the DC to DC converter is used in its imported condition it will either cause improper operation or irreversible damage to the portable computer. However, only after the processing and assembling of the voltage regulator subassembly is completed, which includes the adapter's power distribution subassembly, can the converter be used for its intended purpose as a main power source.

Furthermore, the DC to DC converter when imported can be used as an electrical converter in numerous applications for a variety of electrical equipment, but after being further processed and assembled into a auto/marine adapter the converter's use changes to a power source for automatic data processing machines. This is evidenced by the fact that in its imported condition, the DC to DC converter is classified under subheading 8504.40.80, HTSUS, which provides for: "[s]tatic converters: [o]ther." However, the auto/marine adapter into which the DC to DC converter is incorporated during the assembly operations is classified under 8471.95.34. HTSUS, which provides for "[a]utomatic data processing machines and units thereof; * * * [o]ther: [o]ther: [p]ower supplies: [o]ther." Although a change in classification is not determinative of a substantial transformation, it is a factor to be considered in the totality of the circumstances involved in this case. *See, Koru North America v. U.S.* 701 F. Supp. 229 (CIT 1988).

Based on the reasons above, we find that the Taiwanese DC to DC converter is substantially transformed in the U.S. (Scenario I) and the Netherlands (Scenario II) as a result of being further processed and assembled with other domestic components in the manner described above into an auto/marine adapter. Accordingly, the Country of origin of the auto/marine adapter in Scenario I, is the U.S. Likewise, where all the components except for the Taiwanese DC to DC converter are of Netherland origin (Scenario II), the country of origin is the Netherlands.

You have also requested a country of origin determination for auto/marine adapters which are to be potentially assembled in the Netherlands from U.S. Components and Taiwanese DC to DC converters.

Since, we have determined that the DC to DC converter is substantially transformed as a result of being further processed and assembled into an auto/marine adapter, the remaining issue that must be addressed in determining the country of origin of the auto/marine adapters under these circumstances is whether the U.S. components are substantially transformed as a result of the operations performed in the Netherlands. That is, does the name, character or use of the U.S. components change as a result of the processing and assembly operations performed to manufacture the auto/marine adapter in the Netherlands.

In HQ 734097 (November 25, 1991), Customs considered computer video terminal housings, containing video electronics but no logic boards, manufactured in Korea. After importation into the U.S., four components—the terminal logic board, key switches, T-connector cables, and customs key boards—were installed into the empty shells, and the video unit was aligned to receive new communication protocol transmissions. The addition of the logic boards was determined to create a new article. *See,* HQ 734213 (February 20, 1992) (finding a substantial transformation when a computer monitor was changed into a touchscreen monitor because the touchscreen monitor had a different use than the plain computer monitor).

In this case, we find that the U.S. origin components which are to be assembled into the auto/marine adapter would be substantially transformed as a result of the assembly opera-

tions performed in the Netherlands. Taking approximately 27 components, such as wire, fuses, ferrite adapters, trim pots, resistors, integrated circuits, capacitors, connectors, flux, solder, silicone sealant etc., and assembling these components into the respective subassemblies that are then assembled into an auto/marine adapter clearly changes the name, character or use of the individual components. Prior to the assembly operations, each of these components could be used in the manufacture of electrical devices. However, after assembly, the individual components lose their separate identity and become integral pans of an auto/marine adapter. *See,* HQ 730952 (May 18,1988) (held substantial transformation occurred when coils, capacitors, and cases were assembled into plug-in adapters (e.g., rectifiers), causing individual parts to lose their separate identities when merged into a new article (the plug-in adapter)). *See also,* HQ 711967 (March 17, 1980) (held that television sets which were assembled in Mexico with printed circuit boards, power transformers, yokes and tuners from Korea and picture tubes, cabinets, and additional wiring from the U.S. were substantially transformed in Mexico in that as a result of the Mexican processing all the components lost their individual identities to become integral parts of the new article. Accordingly, the country of origin of the auto/marine adapters which are to be manufactured in the Netherlands with U.S. components and Taiwanese DC to DC converters under the circumstances described above would be the Netherlands.

Holding:

Based upon the facts presented: (1) Taiwanese DC to DC converters are substantially transformed in the U.S. (Scenario I) and the Netherlands (Scenario II) as a result of being further processed and assembled with other components in the manner described above into auto/marine adapters; (2) Taiwanese DC to DC converters and the other components which are of U.S. origin also are substantially transformed in the Netherlands as a result of being further processed and assembled into auto/marine adapters.

Notice of this final determination will be given in the Federal Register as required by 19 CFR 177.29.

Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that Customs reexamine the matter anew and issue, a new final determination.

Any party-at-interest may, within 30 days after publication of the Federal Register notice referenced above, seek judicial review of this final determination before the Court of International Trade.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–49)

MOTOR WHEEL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–10–00549

[Plaintiff's motion for partial summary judgment is granted. Judgment entered for plaintiff.]

(Dated March 20, 1995)

Barnes, Richardson & Colburn (David O. Elliot, Sandra Liss Friedman, and *Alan Goggins),* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mark S. Sochaczewsky);* United States Customs Service *(Chi S. Choy),* of counsel, for defendant.

MEMORANDUM AND OPINION

GOLDBERG, *Judge:* This matter comes before the court on plaintiff's motion for partial summary judgment. Plaintiff, Motor Wheel Corp. ("Motor Wheel"), challenges the decision of the United States Customs Service ("Customs") to classify the subject imports under subheading 7208.90.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as other flat-rolled products of a width of 600 mm or more, of iron or nonalloy steel, dutiable at the rate of 4.5 percent *ad valorem.* In moving for partial summary judgment, Motor Wheel asserts that its merchandise is properly classified as a stamped article under subheading 7326.19.00, HTSUS, dutiable at the rate of free as a product covered under the Automotive Products Trade Act of 1965 ("APTA"). Alternatively, Motor Wheel claims that its imports are properly classified under either subheading 8708.70.80, HTSUS, as road wheels and accessories thereof, or under subheading 8708.99.50, HTSUS, as parts of motor vehicles; both provisions also provide for duty-free entry under APTA. Motor Wheel's motion for partial summary judgment is limited, however, to its claim for classification under subheading 7326.19.00, HTSUS.[1] Although defendant agrees that plaintiff's motion raises no genuine issue

[1] Motor Wheel concedes that both of its alternative claims raise "contested material issues of fact." *Plaintiff's Memorandum in Support of Its Motion For Partial Summary Judgment ("Plaintiff's Brief")* at 2.

of material fact, defendant opposes plaintiff's motion, arguing that Motor Wheel's claims are wrong as a matter of law.[2] The court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Motor Wheel is the importer of record and ultimate consignee of the imported merchandise. The subject imports consist of cut steel of either circular or octagonal shape which has been cut from a nonalloy (hot-rolled) steel coil, to precise dimensions by an automated cookie cutter process. *Plaintiff's Brief* at 2; *id.*, Exh. A, ¶ 2 *("Gifford Affidavit"); id.*, Exh. C, ¶ 2 *("Alfano Affidavit").* With the exception of the steel coil used to make blank numbers 41693B and 41701B, Motor Wheel purchased all of the steel coil used to produce the imported merchandise from Stelco, Inc. ("Stelco"). *Gifford Affidavit* ¶ 4. Furthermore, all steel coil supplied by Stelco to Motor Wheel during the relevant period was produced by Stelco at its plant in Nanticoke, Canada. *Alfano Affidavit* ¶ 2. Prior to importation, Motor Wheel cut the steel coil obtained from Stelco, and die sunk the cut steel with an identifying automotive part number, heat code, date and place of manufacture, and coil identification. *Gifford Affidavit* ¶ 2. After importation, the subject imports were processed into finished wheel discs by undergoing five to nine additional forming operations.[3] The finished wheel discs were then assembled with wheel rims, which were created via a separate process. *Plaintiff's Discovery Response* ¶ 3.

In its motion, Motor Wheel first argues that its merchandise is not classifiable under subheading 7208.90, HTSUS. In the alternative, Motor Wheel argues that should the court find that the subject imports are classifiable under subheading 7208.90, subheading 7326.19 should nevertheless prevail because it is relatively more specific than the provision selected by Customs. Furthermore, should the court find these two provisions equally specific, Motor Wheel argues that pursuant to the General Rules of Interpretation ("GRI") of the HTSUS, subheading 7326.19 should still prevail because it appears last in the tariff schedule. Finally, Motor Wheel contends that, as a matter of law, it has established that its merchandise meets the requirements for duty-free entry under APTA.

In response, the government concedes that the subject merchandise meets the description of an article of iron or steel, forged or stamped but not further worked, as provided for under subheading 7326.19.00, HTSUS. *Plaintiff's Brief,* Exh. B at 2, ¶ 1 *("Defendant's Response To Plaintiff's First Request For Admissions").* The government contends, however, that Customs did not classify the imported merchandise under subheading 7326.19.00 because it is more specifically provided for under subheading 7208.90.00, HTSUS. *Id.* ¶ 2. The government further ar-

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[2] *Defendant's Memorandum in Support of Its Opposition to Plaintiff's Motion For Partial Summary Judgment ("Defendant's Brief")* at 2 & n.2; *Defendant's Response to Plaintiff's Statement of Material Facts as to Which No Genuine Issue Exists* at 1–2 & n.2.

[3] *Plaintiff's Responses to Defendant's Second Interrogatories and Request For Production of Documents ("Plaintiff's Discovery Response")* ¶ 3.

gues that plaintiff's motion for partial summary judgment should be denied because Motor Wheel is wrong as a matter of law with respect to the issues it raises in its motion. *Defendant's Brief* at 3. For the reasons that follow, the court finds that the contested merchandise is properly classified under subheading 7326.19.00, HTSUS, and is dutiable at the rate of free pursuant to APTA.

DISCUSSION

Customs' classification decision enjoys a statutory presumption of correctness; plaintiff bears the burden of overcoming this presumption. 28 U.S.C. § 2639(a)(1) (1988); *Cosmos Int'l v. United States,* 15 CIT 137, 140, 760 F. Supp. 914, 917 (1991). To determine whether the statutory presumption of correctness has been overcome, the court must consider whether the government's classification is correct, both independently and in comparison with plaintiff's proposed alternatives. *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 880 (1984).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(d). Upon review, the court agrees with the parties that Motor Wheel's motion for partial summary judgment does not give rise to any genuine issues of material fact.

Plaintiff's motion raises the following three issues of law. First, the court must determine whether the undisputed facts show that Customs incorrectly classified the subject imports under subheading 7208.90.00, HTSUS. Second, if the provisions advanced by Motor Wheel and the government are both found to describe the imported merchandise, the court must determine which of these two provisions should prevail. Third, if the subject merchandise is found to be properly classified under subheading 7326.19.00, HTSUS, the court must determine whether the undisputed facts show that plaintiff's imports are eligible for duty-free entry under APTA. Each of these issues will be considered in turn.

A. *Classification Under Subheading 7326.19.00, HTSUS:*

Customs liquidated the subject merchandise under subheading 7208.90.00, HTSUS, which provides for: "Flat-rolled products of iron or nonalloy steel, of a width of 600 mm or more, hot-rolled, not clad, plated or coated: Other." Motor Wheel contends that its merchandise is properly classified under subheading 7326.19.00, HTSUS, which provides for: "Other articles of iron or steel: Forged or *stamped, but not further worked:* Other." (Emphasis added). In support of its position, Motor Wheel submits that "flat-rolled products which have been further processed by stamping no longer can be described by the common meaning of the tariff term 'flat-rolled product.'" *Plaintiff's Reply Memorandum in Support of Its Motion For Partial Summary Judgment ("Plaintiff's Reply Brief")* at 2. The court agrees.

The gravamen of the dispute before the court is whether the process of stamping sufficiently advances the flat-rolled steel such that the result-

ing blank (or stamped article)[4] is so distinct from the flat-rolled steel coil input from which it was produced that it can no longer be described by the common meaning of the term "flat-rolled steel" but instead assumes the character of a different article under the tariff schedule. Chapter Note 1(k) to Chapter 72 of the HTSUS provides that:

> Flat-rolled products of a shape other than rectangular or square, of any size, are to be classified as products of a width of 600 mm or more, *provided that they do not assume the character of articles or products of other headings*. [Emphasis added.]

It is undisputed that the subject imports are circular or octagonal, and so, are of a shape other than rectangular or square. It is also undisputed that the subject imports are produced from flat-rolled (hot-rolled) steel. But, as the court further explains below, because plaintiff's merchandise "assume[s] the character of articles or products" of another heading of the HTSUS, the proviso in Note 1(k) precludes classification of the subject imports as flat-rolled steel products under Heading 7208, HTSUS. Motor Wheel has therefore established that Customs' classification is incorrect.

The meaning of a tariff term is a question of law. *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 124, 847 F.2d 786, 788 (1988). Tariff terms are construed according to their common and commercial meanings, which are presumed to be the same. *Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). Congress is presumed to know the language of commerce, and to have framed tariff acts so as to classify articles "according to the general usage and denominations of trade." *Nylos Trading Co. v. United States*, 37 CCPA 71, 73, C.A.D. 422 (1949). In this case, Congress has not provided a definition of the term "flat-rolled product" that is different from its common and commercial meaning. The merchandise at issue is not commonly or commercially known as a flat-rolled product, but rather as a stamping made from flat-rolled steel.

Mr. James Alfano, Vice President and General Manager of Stelco's Lake Erie Works Business Unit, has testified that within the steel industry, flat-rolled products do not commonly and commercially include stampings made from such flat-rolled products; rather, stampings are considered *advanced* steel products. *Alfano Affidavit* ¶ 3. Mr. Keith Gifford, the Manager of Corporate Purchasing for Motor Wheel, has testified that the subject merchandise is commonly and commercially known as a stamping which is stamped from steel mill flat-rolled products. *Gif-*

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[4] A blank is defined as "a shape cut from flat or preformed stock." 4 American Society For Metals, *Source Book on Forming of Steel Sheet* 305 (8th ed.). Blanking is defined as "the cutting of the complete outline of a workpiece in a single press stroke." *Id.*; *see also McGraw-Hill Dictionary of Science and Engineering* 102 (Sybil P. Parker ed., 1984) (blanking is the "[c]utting of plastic or metal sheets into shapes by striking with a punch). The process of stamping has been similarly defined as follows:

> [T]o cut out, bend, or form by a blow or sudden pressure with a stamp or die.

Webster's Third New International Dictionary of the English Language Unabridged 2222 (1993). The court notes that the cutting process involved in the production of plaintiff's merchandise meets both definitions. The court further notes that stamping has been recognized as a distinct manufacturing process. *W.R. Filbin & Co. v. United States*, 73 Cust. Ct. 56, 69, C.D. 4554 (1974). The court will therefore refer to plaintiff's merchandise interchangeably as a "stamping," "blank," or "stamped article" which has resulted from a "stamping" or "blanking" process.

ford Affidavit ¶ 3. Accordingly, the steel industry does not consider stampings to be within the class or kind of steel mill products known as flat-rolled products.[5] *Alfano Affidavit* ¶ 3. The uncontroverted testimony of Mr. Alfano and Mr. Gifford attests to the fact that a stamping is considered within the relevant industry to be sufficiently advanced to merit description as an article distinct from the flat-rolled steel coil input from which it was produced. Indeed, Congress has recognized as much by expressly providing for stamped articles of steel which have not been further worked under subheading 7326.19.00, HTSUS.

In addition, the court notes that the "flat-rolled products" industry is recognized as being separate from the "automotive stampings" industry. The *Standard Industrial Classification Manual*[6] distinguishes between manufacturers of flat-rolled products and establishments which produce automotive stampings. Manufacturers of flat-rolled (hot-rolled) steel products fall under Industry Group No. 331, Industry No. 3312.[7] Manufacturers of automotive stampings, on the other hand, are expressly provided for under Industry Group No. 346, Industry No. 3465.[8]

Significantly, even the government concedes that plaintiff's merchandise meets the description of an article of iron or steel, forged or stamped but not further worked, as provided for under subheading 7326.19.00, HTSUS. *Defendant's Response To Plaintiff's First Request For Admissions* ¶ 1. Defendant responds, however, by noting that under GRI No. 1 of the HTSUS, classification is determined according to the terms of the *headings* and any relative section or chapter notes. The government observes that the proviso in Chapter 72, Note 1(k), permits classification of flat-rolled products under Chapter 72, if such merchandise does not "assume the character of other *headings*." (Emphasis added). Because Motor Wheel's proposed Heading 7326 includes only the terms "other articles of iron or steel," and not the phrase "[f]orged or stamped, but not further worked," defendant argues that the merchandise does not assume the character of Heading 7326. The court notes, however, that "[f]or the purposes of the tariff schedule, unless the context otherwise requires * * * a reference to '*headings*' encompasses subheadings indented thereunder." General Note 7(f), HTSUS. The court finds that in this case the context does not "otherwise require." Because subheading 7326.19 includes the phrase "[f]orged or stamped, but not further worked," the government's argument must fail. The court finds that the proviso in Chapter 72, Note 1(k) is applicable in this case, and precludes classification of the subject imports under subheading 7208.90.00, HTSUS.

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[5] Mr. Alfano further testified that flat-rolled products in the steel industry are commonly and commercially known as steel mill products and include "sheets, strip, tin plate, black plate, flat bars, slabs, plates, coils, skelp and hoop." *Alfano Affidavit* ¶ 3.

[6] Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

[7] *Id.* at 173; *Plaintiff's Brief*, Exh. 1 to Exh. C.

[8] *Id.* at 191; *Plaintiff's Brief*, Exh. 2 to Exh. C.

For the foregoing reasons, the court finds that Customs' classification is incorrect, and that plaintiff's merchandise is classifiable under subheading 7326.19.00, HTSUS. Because the court finds that the subject imports are not classifiable under the provision chosen by Customs, the court need not engage in a relative specificity inquiry with regard to the provisions advanced by each of the parties.

B. *Duty-Free Entry Under APTA:*

APTA provides for duty-free entry of imported merchandise that meets the following requirements:

1. It must be a Canadian article;
2. It must have been obtained from a supplier in Canada under or pursuant to a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States;
3. It must be a fabricated component; and
4. It must be intended for use as original equipment in the manufacture in the United States of a motor vehicle.

General Note 3(c)(iii)(A)(2), HTSUS. As an initial matter, the court notes that Motor Wheel has abandoned its claims with regard to blank numbers 41693B and 41701B, which were produced from steel of Japanese origin. *Plaintiff's Brief* at 22 n.4; *Gifford Affidavit* ¶ 4. Consequently, these two blank numbers are no longer at issue in this action. In addition, the government concedes that plaintiff's remaining entries were made from steel of Canadian origin; therefore, this prerequisite for duty-free entry is met.

The parties do not dispute that importation of plaintiff's merchandise is pursuant to a contract with a bona fide motor vehicle manufacturer in the United States. *Gifford Affidavit* ¶ 2. The parties also do not dispute that the ultimate intended use of the merchandise is as original equipment, i.e. wheel discs, in the manufacture in the United States of a motor vehicle. Indeed, this is reflected on the merchandise itself, as it is die sunk with an identifying automotive part number. Moreover, in its response to plaintiff's first interrogatories, defendant concedes that Customs has not identified any actual use, fugitive or otherwise, for the imported merchandise other than in the production of automotive parts. *Plaintiff's Reply*, Exh. A, ¶ 7 *("Defendant's Responses To Plaintiff's First Interrogatories And Request For Production Directed To Defendant").* As a result, these prerequisites for duty-free entry under APTA are also satisfied.

Finally, for the reasons that follow, the court finds that the subject merchandise is a fabricated component and therefore merits duty-free entry pursuant to APTA. First, legislative history suggests that the term "fabricated component" should be construed broadly to achieve the statute's desired end. APTA was intended to reduce trade tensions and expand trade in automotive products between Canada and the United States through tariff reduction, thereby permitting more effi-

cient use of manufacturing facilities in the two countries.[9] *See* S. Rep. No. 782, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 3670, 3671–72. The intended scope of the term "fabricated component" is addressed in the report of the House Ways and Means Committee on APTA, which states:

> The term "fabricated component" is a term of limitation which embraces finished *or unfinished components* actually incorporated into a motor vehicle. The term does not, however, include materials such as metal plate, sheet, strip, wire, pipes and tubes, and textile piece goods. In other words, *although at the time of importation the component does not have to be in a condition completely ready for assembly without further fabrication, it must at a minimum be so far processed as to be physically recognizable as a component in an unfinished state.*

H.R. Rep. No. 537, 89th Cong., 1st Sess. at 27 (1965) (emphasis added). Significantly, neither the legislative history nor the act itself defines the degree of fabrication which an article must undergo in order to be considered a "fabricated component" under APTA. The only criteria that must be met is that the imported merchandise "be so far processed as to be physically recognizable as a component in an unfinished state."

Case law also reflects that the term "fabricated component" is to be construed broadly under APTA. In *John V. Carr & Son, Inc. v. United States,* 76 Cust. Ct. 162, 414 F. Supp. 620 (1976), the court addressed whether imported bulk plastic automotive air brake hose, which required despooling and cutting to length following importation, was a "fabricated component." Because the imported hose was an automotive component that required no further fabrication upon importation,[10] the *Carr* court held that it was clearly a fabricated component under APTA. In reaching its decision, the court emphasized that the imported hose "more than [met] the requirements of the Ways and Means Committee report to qualify as a 'fabricated component.'" *Carr,* 76 Cust. Ct. at 177, 414 F. Supp. at 631. In particular, the court stressed that the imported hose was physically recognizable as an automotive component and was specifically designed in accordance with specifications promulgated by the Society of Automotive Engineers ("SAE"),[11] which was reflected in the product's labelling. *Id.*, 414 F. Supp. at 631. Also evident is the fact that the imported merchandise in *Carr* had been advanced beyond the material state of its inputs prior to importation. *See id.* at 175–77, 414 F. Supp. at 630–31.

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[9] APTA was enacted in response to a controversial 1963 Canadian plan to promote automotive exports to the United States. *See generally* H.R. Rep. No. 537, 89th Cong., 1st Sess. (1965). Specifically, APTA was enacted on October 21, 1965, to provide for the implementation of the Agreement Concerning Automotive Products Between the Government of the United States of America and the Government of Canada signed on January 16, 1965. 19 U.S.C. § 2001 (1988). As a result of this Agreement, Canada revoked its controversial plan to promote automotive exports to the United States. S. Rep. No. 782, 89th Cong., 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 3670, 3672.

[10] The *Carr* court noted that cutting to length does not constitute further fabrication. *Carr,* 76 Cust. Ct. at 176, 414 F. Supp. at 630.

[11] The Society of Automotive Engineers is an automotive industry association which prepares specifications for automotive components. *Carr,* 76 Cust. Ct. at 167, 414 F. Supp. at 624.

Similarly, in this case the subject imports are stamped from steel which has been manufactured in accordance with SAE specifications for the tensile and yield strengths needed for the fatigue loading requirements of a finished wheel disc;[12] the coil identification information that was die sunk into the merchandise prior to importation reflects the merchandise's conformity with SAE specifications. In addition, as the court noted previously, the subject merchandise is advanced beyond the material state of the flat-rolled steel coil input via the stamping process. Thus, although the subject imports require five to nine additional post-importation fabrication steps, such further fabrication, in and of itself, does not preclude the conclusion that plaintiff's merchandise is sufficiently fabricated to be considered a "fabricated component" under APTA.[13]

In sum, based upon: uncontroverted evidence that the subject merchandise is fabricated beyond the material state of the flat-rolled steel coil input prior to importation; the merchandise's conformity with SAE specifications for finished wheel discs, which is reflected in the coil identification information that was die sunk into the merchandise prior to importation; the fact that the subject merchandise was die sunk with an identifying automotive part number prior to importation; and the fact that Customs has identified no other use for the subject imports other than as a component of manufactured wheel discs, the court finds that the imported merchandise is in fact "so far processed as to be physically recognizable as a component in an unfinished state." Consequently, the court finds that this final prerequisite for duty-free entry under APTA is satisfied.

CONCLUSION

Upon review, the court holds that Motor Wheel has overcome the statutory presumption of correctness that attaches to Customs' classification decision, and has established that Customs incorrectly liquidated the subject imports under subheading 7208.90.00, HTSUS, because that provision does not encompass stampings cut from flat-rolled steel. The court finds that plaintiff's merchandise is commonly and commercially known as a stamping which has been cut from flat-rolled steel, and is therefore properly classified under subheading 7326.19.00, HTSUS. The court also finds that the subject imports are fabricated components within the meaning of APTA. Consequently, because the contested merchandise meets all of the requirements for duty-free entry under APTA, the court holds that the imports at issue are dutiable at the rate of free. For the forgoing reasons, plaintiff's motion for partial summary judgment is granted. Judgment will be entered accordingly.

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[12] All of the steel coil purchased by Motor Wheel from Stelco met either SAE specification 1015 or 955XF. *Gifford Affidavit* ¶ 4.

[13] The court notes that there is no evidence that, in enacting the HTSUS, Congress intended to alter the broad scope of the term "fabricated component" under APTA.

(Slip Op. 95–50)

KERN-LIEBERS USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AK STEEL CORP., BETHLEHEM STEEL CORP., GULF STATES STEEL INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LTV STEEL CO., INC., NATIONAL STEEL CORP, SHARON STEEL CORP., U.S. STEEL GROUP A UNIT OF USX CORP., AND WCI STEEL, INC., INTERVENOR-DEFENDANTS

Court No. 93–09–00551–AD

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

(Decided March 23, 1995)

Porter, Wright, Morris & Arthur (Leslie Alan Glick) for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, and *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce *(Jeffrey C. Lowe),* of counsel, for the defendant.

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer and *John J. Mangan)* and *Dewey Ballantine (Alan Wm. Wolff, Michael H. Stein, Bradford L. Ward* and *Guy C. Smith)* for the intervenor-defendants.

MEMORANDUM

AQUILINO, *Judge:* The plaintiff importer of merchandise described as "[c]ertain cold-rolled seat belt retractor spring steel with a specific chemical composition, restricted inclusion levels, and a particular microstructure and tensile strength"[1] complains of the refusal of the International Trade Administration, U.S. Department of Commerce ("ITA") to exclude such imported material from the scope of its final determination of sales of certain cold-rolled steel products from Germany at less than fair value, 58 Fed.Reg. 37,136 (July 9, 1993), *amended,* 58 Fed.Reg. 44,170 (Aug. 19, 1993).

I

The record of the proceedings before the ITA indicates that an identical product is not manufactured domestically, nor did the underlying petition of the domestic industry focus on the imported product *per se.* Whereupon the respondent importer requested exclusion from the ensuing investigation and affirmative determination based on the following grounds, among others:

> Seat belt retractor steel springs are a unique product because the steel produced must meet the rigid standards of the National Highway Transportation Safety Administration. Federal Motor Vehicle Safety Specification 209 outlines specifications for seat belt re-tractor springs to ensure motor vehicle safety. Kern-Liebers is the primary source of these products in the United States, and no domestic steel producer can uniformly meet the specifications imposed by the U.S. Government or supply the quantities needed by Kern-Liebers * * *.

[1] 58 Fed.Reg. at 37,076.

> * * * The U.S. produced hot band steel product does not meet the specifications for maximum inclusion levels, the standard for durability of seat belt retractor springs, and cannot be used in cold rolling the product.
>
> * * * * * * *
>
> Seat belt retractor steel used for producing seat belt retractor springs is a different "class or kind" of merchandise than the products produced by petitionners. The specifications for Kern-Lieber's *[sic]* product are distinct from that manufactured by petitioners. The expectations of Kern-Lieber's *[sic]* customers for these products are extremely high. Whereas the steel described in the petition is distributed to wholesalers and distributors, seat belt retractor steel is imported or purchased directly from the producer and converted to springs through a manufacturing process by Kern-Liebers and sold directly to the end-users. Finally, the highly specialized use of the steel manufactured by Kern-Liebers differs from the use of the steel that is manufactured by petitioners.[2]

In denying exclusion, the ITA stated its position generally as to all the claims regarding scope, including that now at bar, to wit:

> * * * [A]ll of the products listed * * * are flat-rolled and clearly fall within the chemical *(i.e.,* carbon steel) * * * characteristics indicated in the scope description. Furthermore, unless specifically excluded, all * * * cold-rolled * * * products meeting those criteria are included within the scope regardless of any other technical properties which the steel may possess. While all of these products possess some physical characteristics which make them different from other steel products, none of those differences rise to the level of class or kind distinctions and only reflect relatively minor variations within the overall * * * cold-rolled * * * classes or kinds. Were the Department to subdivide the scope to reflect every particular type of carbon steel flat product produced, we would have been faced with creating an absurdly large or even infinite number of classes or kinds * * *.
>
> Regarding the other *Diversified Products* criteria, the ultimate uses and purchaser expectations of the products listed * * * are similar to those of other products within their respective classes or kinds * * *. The cold-rolled products in the list * * * will be used in applications in which surface characteristics and narrower tolerances are important, and consumers will expect the product to possess the qualities of a steel product which has been flat-rolled at ambient temperatures * * *. Carbon steel flat products in the three classes or kinds are generally sold both directly to end users as well as to service centers; that the products * * * may be more likely to be sold directly to end users does not differentiate them from other products in those classes or kinds. Lastly, products in the * * * cold-rolled * * * classes or kinds are all advertised in the same manner, that is, in producer catalogs and other promotional literature. Certain products * * * may be developed by the manufacturer in cooperation with one or more end users and might not necessarily be

[2] Appendix to Pre-Hearing Brief of Kern-Liebers USA, Inc., pp. A-8, A-9 to A-10.

> included in such advertising. However, this possible difference in the method of advertising does not support the assertion that the products listed * * * constitute separate classes or kinds.
>
> Regarding like product issues, in the absence of persuasive evidence that the like products and domestic industries identified by the ITC are inappropriate to follow for purposes of standing, it is the Department's usual practice to defer to the like product descriptions developed by the ITC * * *. In these investigations, the like product descriptions written by the ITC in its preliminary injury determinations are equivalent to the Department's scope definitions. Thus, we believe that the products listed * * * do not constitute separate like products, and that petitioners do have standing regarding these particular products * * * [P]etitioners are not required to manufacture every product within the like product designation * * * and the statute does not require the Department to consider the domestic availability of a particular product within the scope when considering a scope exclusion request * * *.

58 Fed.Reg. at 37,076.

In its complaint filed herein, the plaintiff avers, *inter alia*, that the ITA "failed in its statutory duty to investigate and analyze each scope exclusion request individually and make specific findings of fact" [para. 4] and that the agency should not have relied on the like-product analysis of the International Trade Commission ("ITC"). The complaint also states that the ITA did conclude that hot-rolled seat-belt retractor steel was not within the scope of its determination and that, since the same special characteristics which distinguish that product apply to the cold-rolled counterpart, the determination on its face is an inconsistent application of the facts and the law. The plaintiff prays that the court either reverse the agency's determination or, at a minimum, remand to the ITA for specific findings in accordance with the factors approved by the Court of International Trade in *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F.Supp. 883 (1983), and subsequent cases. This relief is sought via a motion for judgment on the agency record per CIT Rule 56.2.

The defendant opposes the motion on grounds that the ITA has broad discretion to define the scope of its investigations; that the scope defined herein, namely, cold-rolled carbon steel flat products, covers plaintiff's retractor steel in accordance with the petition's description of merchandise and the ITC's determination(s); and that analysis à la *Diversified Products* confirms inclusion. The intervenor-defendants add in further opposition that they are not required to produce every variation of a product within a given class or kind.

Jurisdiction of the court is based on 28 U.S.C. §1581(c), with the standard of judicial review of the issues raised whether the challenged ITA determination is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. §1516a(b)(1)(B).

II

There should be little doubt by now that the scope of an investigation and subsequent determination pursuant to the Trade Agreements Act of 1979, as amended, lies largely in the ITA's discretion. *E.g., Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1583 (Fed.Cir. 1990). And the agency generally exercises this "broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F.Supp. 117, 120 (1992), *aff'd on other grounds*, 984 F.2d 1178 (Fed.Cir. 1993).

The record at hand shows ITA adoption of the description contained in the petition without modification, to wit, "cold-rolled carbon steel flat products", treating them as one class or kind of merchandise. On its part, the plaintiff admits that its merchandise enters under HTS subheading 7211.30.10 ("Flat-rolled products of iron or nonalloy steel, of a width of less than 600 mm, not clad, plated or coated: * * * Not further worked than cold-rolled (cold-reduced), of high-strength steel: Of a width of less than 300 mm: Of a thickness exceeding 0.25 mm"). In short, there is no dispute that plaintiff's product[3] satisfies the petition's definition.

As indicated, what the plaintiff does dispute is the agency's failure to analyze separately the request for exclusion from the resultant proceedings. The complaint refers to a "statutory duty" to do so, but this court is unable to discern such an individuated requirement in the governing statute and regulations. This does not mean, however, that a determination reached as to a class or kind of merchandise as a whole need not apply to each good deemed a part thereof. To the extent questions are raised as to a particular item, the ITA (and the courts) have considered the following criteria: the general physical characteristics of the merchandise, the expectations of the ultimate purchasers, the channels of trade in which the merchandise moves, the ultimate use of the merchandise, and cost. *E.g., Diversified Products Corp. v. United States*, 6 CIT 155, 162, 572 F.Supp. 883, 889 (1983); 19 C.F.R. §353.29 (1993). Such assessment generally has been of newly-developed goods, that is, merchandise which is created after entry of an antidumping or countervailing duty order by the ITA, as well as of instances of alleged attempted circumvention. *See* 19 U.S.C §1677j(d) (1988). Here, plaintiff's product is not newly-developed; it existed before the petition. On the other hand, if the foregoing factors are nevertheless dispositive of plaintiff's complaint, the record supports the agency finding of similarity of general physical characteristics among the cold-rolled products covered. Furthermore, the court is not persuaded after review of the record that the conclusions quoted above for the entire class "[r]egarding the other *Diversified Products* criteria"[4] would change were plaintiff's product, standing alone, to be reconsidered by the ITA.

[3] For its chemical composition and other required specifications, see *id.* at A2.

[4] 58 Fed.Reg. at 37,076.

Also quoted above from the agency's determination is the representation that, in antidumping proceedings, "the like product descriptions written by the ITC in its preliminary injury determinations are equivalent to the Department's scope definitions."[5] The plaintiff challenges this reasoning, just as it challenged separately the Commission's determination of material injury to the domestic industry by reason of its imports. That challenge has now been dismissed. *Kern-Liebers USA, Inc. v. United States*, 19 CIT ____, Slip Op. 95–9 (Jan. 27, 1995), *notice of appeal filed* Feb. 24, 1995. The court affirmed the ITC's finding that plaintiff's seat-belt retractor steel is not a product separate from other types of cold-rolled steel products subject to the investigation:

> The court finds the distinctions drawn by Kern-Liebers constitute "minor differences" and do not merit a separate like product determination.

19 CIT at ____, Slip Op. 95–9, at 11, quoting *Cambridge Lee Indus., Inc. v. United States*, 13 CIT 1052, 1055, 728 F.Supp. 748, 750–51 (1989).

With regard to the dropping of hot-rolled seat-belt retractor spring steel from the ITA investigation, that resulted from a request by the petitioning domestic industry to amend the petition(s) to exclude that product. And the intent of a petitioner and the face of its petition can be conclusive of the scope of the ensuing administrative proceedings. *Cf. Minebea Co. v. United States, supra.* Moreover, plaintiff's counsel admitted during oral argument herein that the hot-rolled product is not competitive with the one at bar. *See* Tr. at 6–7.

III

In view of the foregoing, the court is unable to conclude that the determination of the ITA was not in accordance with law. Also, given the record presented and the rule that the possibility of drawing two inconsistent conclusions from its contents does not prevent the ITA's ruling from being supported by substantial evidence[6], plaintiff's motion for judgment on that record must be denied and this action dismissed.

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[5] *Id.*

[6] *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Torrington Co. v. United States*, 14 CIT 507, 513–14, 745 F.Supp. 718, 723 (1990), *aff'd*, 938 F.2d 1276 (Fed.Cir. 1991).

(Slip Op. 95–51)

EVERFLORA MIAMI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–07–00401

(Dated March 24, 1995)

Peter S. Herrick, Esq., for plaintiff.
Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(Carla Garcia-Benitez,* Esq.).

OPINION AND ORDFR

INTRODUCTION

NEWMAN, *Senior Judge:* Plaintiff, an importer of cut flowers from Colombia through the Miami, Florida Customs District, brings this action pursuant to to 28 U.S.C. § 1581(a), 19 U.S.C. §§ 1514(a) and 1520(c)(1) contesting the denial of four protests by the U.S. Customs Service ("Customs") as untimely filed; alternatively, plaintiff contests Customs' refusal to reliquidate the entries pursuant to § 1520(c)(1) grounded on a mistake of fact as to the identity of the Colombian grower/shippers, resulting in assessment of an incorrect rate of dumping duties assigned by the Department of Commerce on cut flower importations from Colombia. Currently before the court for decision is defendant's motion for a stay of discovery and/or protective order. For the reasons stated hereinafter, the motion is granted.

BACKGROUND

On November 23, 1994 plaintiff served on the Government two "subpoena duces tecum for deposition," the depositions to be held in Miami on December 19, 1994. Defendant responded by filing on December 15, 1994 a motion for a stay of discovery and/or protective order.

One subpoena directs defendant to produce in Miami, Florida "a witness from the Miami Customs District with the most knowledge of the protest and [section] 520(c)(1) procedures," and to provide plaintiff with certain documents generated by the United States Customs Service ("Customs") "as to when late filed protests are to be acted upon and when and if late file [sic] protests be considered as claims filed pursuant to 19 U.S. [sic] § 1520(c)(1)."

The other subpoena commands defendant to provide "a witness from the Miami Customs District with the most knowledge of the dumping duty investigation of imported cut flowers," and to provide plaintiff with various documentation generated by Customs and the U.S. Department of Commerce relating to reimbursement statements and "how dumping duties were to be determined once the name of the shipper/grower was made known to Customs."

After service of the discovery subpoenas for the two depositions and production of documents, but prior to the date for the depositions, de-

fendant on December 8, 1994 moved for severance of all entries except Entry No. 381–0064412–9 and of all protests except Protest No. 5201–93–10057 to the extent that Protest No. 5201–93–10097 covers Entry No. 381–0064412–9, for docketing of a separate severed civil action, Court No. 94–07–0401–S, to cover the severed entries and protests; and moved for partial judgment on the pleadings (or alternatively for summary judgment) dismissing such severed action for lack of jurisdiction and/or for failure to state a claim upon which relief may be granted.

Defendant predicates partial lack of jurisdiction in this case on the ground of untimeliness of the protests under § 1514 with respect to forty-two of the forty-three entries. Further, defendant asserts lack of jurisdiction and failure of the complaint to state a claim upon which relief may be granted on the insufficiency of the untimely protests to alternatively constitute notices of mistake of fact or other inadvertence and as requests for reliquidation under 19 U.S.C. § 1520(c)(1). Plaintiff has responded to defendant's motion for severance and partial judgment on the pleadings with a cross-motion for summary judgment granting reliquidation of the entries covered by the untimely protests under § 1520(c)(1).

In short, if defendant's pending motion for severance and dismissal is granted, the current civil action would continue with respect to a single entry, No. 381–0064412–9, covered by Protest No. 5201–93–10057, for which entry defendant concedes the court has jurisdiction in this action.

PARTIES' CONTENTIONS

Defendant posits as grounds for a stay of discovery and/or protective order that the discovery sought by plaintiff will become unnecessary if a partial judgment of dismissal is granted for lack of jurisdiction; and in any event, even if defendant's motion for severance and dismissal is denied, plaintiff's mode of discovery should be limited to interrogatories and requests for production of documents. Defendant, moreover, maintains that discovery is unnecessary into the Customs Service's "protest and 520(c)(1) procedures" as there are no material issues of fact pertaining to that claim, and therefore, no material factual matters that could be the subject of discovery by deposition.

Plaintiff responds that, if it so chooses, it has the right to discovery by deposition, that it has the choice of discovery vehicles, their sequence, and timing, and that such rights of discovery exist even if only a single entry covered by the complaint survives defendant's motion for severance and dismissal.

DISCUSSION

Plaintiff's subpoenas named the United States as the deponent. CIT Rule 30(b) permits a party to serve a notice of deposition on oral examination and a subpoena upon the United States or an agency thereof and "describe with reasonable particularity the matters on which examination is requested." The Government must then designate one or

more of its appropriate officers or employees to appear and give testimony at the deposition.

Plaintiff's subpoenas for the taking of depositions of the United States clearly failed to describe with reasonable particularity the matters on which examination is requested.

In one subpoena, plaintiff vaguely requests that defendant designate a witness from the Miami District having the "most knowledge" of "protest and 520(c)(1) procedures," but completely fails to describe with reasonable particularity the factual matters for which deposition testimony is sought by plaintiff; and considering that the statute cited in the subpoena has national application to Customs, plaintiff submits no justification or explanation of why the designation of a witness by the Government should be restricted to the Miami Customs District.

In the other subpoena, plaintiff again, vaguely requests that defendant designate a witness from the Miami District having the "most knowledge" of "the dumping duty investigation of imported cut flowers," but again fails to provide even a hint as to the particular factual matters relating to such dumping investigation on which testimony by plaintiff is sought by deposition. Again, considering that the dumping duty *investigation* into sales at less than fair value (*viz.*, dumping margins) was conducted by the Department of Commerce, not Customs, plaintiff provides no explanation of why the designation should be restricted to a witness from the Miami Customs District.

Depositions on oral examination are an authorized, indeed very commonly used, form of discovery and are used not only for trial purposes, but in support of or in opposition to motions for summary judgment. As previously noted, plaintiff's cross-motion for summary judgment to defendant's motion for severance and partial dismissal on the pleadings is *sub judice,* Unfortunately, both plaintiff's brief and subpoenas are bereft of even a hint as to the factual matters on which examination is requested and upon which factual inquiries defendant must designate one or more appropriate witnesses to be deposed.

Consequently, appropriate as depositions may be as a discovery vehicle, the court cannot agree with plaintiff's contention that there is no basis for a stay of discovery or the issuance of a protective order in compliance with Rule 26(c). Matters relating to protests, requests for section 520(c)(1) reliquidation, and antidumping investigations, all involve a broad spectrum of diverse administrative responsibilities of the Customs Service and Department of Commerce. Yet, the subpoenas are addressed to the United States Government and narrowly request designation of witnesses from Miami having the "most knowledge" of the above-mentioned matters, but they utterly fail to comply with the requirement of CIT Rule 30(b) that a notice of deposition addressed to a Government agency disclose with reasonable particularity the factual matters on which examination is requested. Given the uncertain scope and nature of the deposition testimony to be elicited by plaintiff, the subpoenas impose an unreasonable demand and restriction on defen-

dant in the designation of the appropriate witness or witnesses. Moreover, plaintiff surely recognizes the possibility that the court may find, as a matter of law, there is no jurisdiction in this case with respect to the forty-two of forty-three entries covered by the protests filed at the Miami Customs District and which are the subject of defendant's pending motion for partial judgment of dismissal on the pleadings or dismissal for failure of the complaint to state a claim upon which relief may be granted.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/35 3/20/95 Carman, J.	Heraeus Amersil, Inc.	82–11–01525, 83–09–01369	548.05 10.3% 540.67 25%, 23.1%, 19.4%, etc.	547.53 8.4% etc. Various rates	Agreed statement of facts	New York Rotosil fused quartz tubes and bell jars, fused quartz or silica or any other merchandise classified as optical glass under item 540.67
C95/36 3/24/95 Aquilino, J.	Benteler Industries, Inc.	89–09–00503	610.52 7.5% + additional duties on the aloy content of the steel	692.32 3.1%	Agreed statement of facts	Detroit Tubular sections of BTR 110

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